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Supreme Court, U.S.
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No:

In the
Supreme Court of the United States

CURTIS E. ELLISON

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On petition for writ of certiorari from the United States Sixth Circuit Court of Appeals, 04-1925

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR IN REVERSING THE DECISION OF THE DISTRICT COURT SUPPRESSING THE EVIDENCE IN DEFENDANT'S CASE FOR THE REASONS STATED IN JUDGE MOORE'S DISSENTING OPINION, WHERE THE ATTORNEY GENERAL DID NOT RAISE THE ISSUE OF THE LICENSE PLATE LEIN CHECK AT THE TRIAL COURT, THE MAJORITY FAILED TO RECOGNIZE THE FOURTH AMENDMENT CONCERNS INHERENT IN LEIN CHECKS, AND THE MAJORITY FAILED TO APPRECIATE THE EQUAL PROTECTION ISSUES OF RACIAL PROFILING WHEN THE TRIAL COURT SPECIFICALLY STATED THAT IT DID NOT BELIEVE THE OFFICER'S TESTIMONY?

The District Court says, YES.
The United States Sixth Circuit Court says, NO
Respondent says, NO.
Petitioner says, YES.

IN THE SUPREME COURT
OF THE UNITED STATES

CURTIS E. ELLISON, CASE NO:

Petitioner, US Sixth Circuit No: 04-1925

V E.D. Mich. No. 04-CR-80084

UNITED STATES OF AMERICA,

Respondent.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 29, Curtis E. Ellison makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO.**

If the answer is "yes," list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly owned corporation, not a party to the case, that has a financial interest in the outcome? **NO.**

If the answer is "yes," list below the identity of the corporation and the nature of the financial interest.

Kevin Laidler **Date** 4-17-07

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OPINIONS BELOW

The January 17, 2007 decision of the Court of Appeals Denying Rehearing En Banc is not reported (APX C). The decision of the Court of Appeals on the Merits (APX A) is reported at 462 F.3d 557 (2006). The May 18, 2004 decision of the District Court (APX B) is unreported.

STATEMENT OF JURISDICTION

On January 17, 2007, the Court of Appeals for the Sixth Circuit denied plaintiff's timely petition for rehearing en banc. The Court of Appeals original opinion was entered September 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Am IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Am. V provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Am. XIV provides in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court of Appeals reversed the decision of the District Court suppressing the evidence obtained from a search of the vehicle in which defendant was a passenger. The officer in question testified that he reason he began investigation of the van in question was that it was parked illegally in a fire lane – an allegation that was determined to be completely false. Defendant had alleged that the investigation had been racially motivated.

The Court of Appeals found that the license plate of the vehicle could have been investigated on the police LEIN system without probable cause, and thus the eventual stop was justified due to the existence of outstanding warrants on the defendant, the owner of, and passenger in, the van. However, the attorney general did not argue this theory at the trial court, and indeed the officer testified that the sole reason for pulling over the van was the bogus theory that it was parked illegally. The appellate court determined the result

based on an argument presented for the first time on appeal by the attorney general.

However, the Court of Appeals decision was not unanimous. Judge Karen Nelson Moore issued a vehement dissent, noting that arguments not presented by the parties are not ripe for review, as well as lending credence to the racial profiling theory of the defendant. Defendant filed a timely motion for rehearing; however, only Judge Moore requested rehearing the reasons in her original dissent, and thus rehearing was denied. This application for writ of certiorari followed.

1. Background

This case arises from a stop of a vehicle on New Years Eve 2003. Defendant (Petitioner) was a passenger in the car which had stopped in front of a store to purchase champagne for a celebration later that evening.

Farmington Police Officer Mark Keeley had been on the force for approximately two years at the time of the events. On December 31, 2003 (New Year's Eve), Keeley was working the afternoon shift (4:00 p.m. - 12:00 a.m.). At approximately 7:30 p.m., Keeley was patrolling the area near a strip mall on Grand River Avenue and Farmington Road, which was part of his routine area of patrol. He testified that there are "No Parking," "No Stopping," "No Standing," and "Fire Lane" signs along the sidewalk outside of the business establishments and along the strip mall for the purpose of keeping traffic flowing on the "through lanes," along the perimeter of the parking lot.(Appendix C)

Encounter with Defendant

Officer Keeley testified that there was a white van impeding his progress when he turned into the parking lot and got into a "through lane" for traffic. Consequently, he

had to wait behind the van, as there was other traffic. *Id.* Edward Coleman, the driver of the white van, testified that he dropped defendant off at one of the stores in the strip mall ("Cigar & Wine Emporium") and left the "through lane" in which Officer Keeley was traveling. Coleman then traveled a few feet, turned around and parked across from the store in the opposite direction of the "through traffic" in which Officer Keeley traveling. As such, he could not have been blocking Keeley's lane. Specifically, Coleman testified that he was absolutely not parked in the fire lane impeding Keeley's progress. Both defendant and Coleman are African-American. (Appendix C)

Additionally, Coleman testified that he was never approached about being parked illegally by Officer Keeley or any other law enforcement official as he sat in the van waiting for defendant to come out of the store.

Keeley's description was considerably different. He testified that he had to wait behind the van which was blocking traffic. Importantly, at this point, Keeley determined that the van was parked illegally since the van was stopped in a "through lane" of traffic in violation of the "Fire Lane" directives on the posted signs. Officer Keeley took down the van license information and ran a LIEN check on the license plate number allegedly because the van was allegedly parked illegally. He then drove into the parking lot of the strip mall and positioned himself so that he could observe the van. (Appendix C)

Officer Keeley testified that the van was allegedly in the illegal parking spot for approximately two minutes. During that time, the results of the LIEN check came back indicating that the owner of the van, defendant, had a felony warrant out for his arrest in Detroit and that the warrant was for family related offenses. *Id.*

Instead of approaching the van at that time, Officer Keeley testified that he waited in his vehicle, continued to observe the van and called radio dispatch for backup

assistance. However, before his back-up could arrive, defendant left the store, returned to the van, and left the strip mall parking lot traveling eastbound on Grand River Ave. *Id.*

Despite the absence of back-up, the officer proceeded to follow the van out of the parking lot. Eventually Officer Scott Hermann arrived behind Officer Keeley *after* he had already pulled the van over approximately one to two miles from the strip mall. Keeley advised the driver that he was being stopped because he was illegally parked in a fire lane at the strip mall. Defendant told Keeley that he was the registered owner of the van. The officer obtained both men's driver's licenses. After running a computer check on the driver's licenses, he determined that defendant was indeed the registered owner and fit the description of person indicated in the felony warrant. *Id.*

Discovery of firearms

Defendant was patted down by Officer Hermann, allegedly for officer safety purposes and due to the felony warrant. Coleman remained in the van while the search progressed. During the pat down, Hermann retrieved a hand gun from defendant's jacket. Another officer, Sergeant Hennessey, subsequently arrived on the scene and repeated the pat down of defendant. A different handgun was found on defendant during the second search. (Appendix C)

Defendant was taken into custody. However, Coleman was released without ticket regarding the alleged parking violation. *Id.*

2. Initial Proceedings in District Court

Defendant was indicted on February 4, 2004 for Felon in Possession of a Firearm, pursuant to 18 U.S.C. §922(g)(1). On April 19, 2004, Defendant filed a Motion to Suppress Evidence or in the Alternative for an Evidentiary

Hearing. No responsive brief was filed with the district court. An evidentiary hearing was held on May 18, 2004.

Defendant raised several key arguments in regard to the constitutional illegality of the stop, including the lack of probable cause for a traffic stop based on the parking situation at the strip mall; that the alleged traffic violation was merely a pretextual reason for the stop, which was actually racially motivated; and that the stop was longer than required to determine that the driver, Coleman, was not the owner of the vehicle with felony warrants. (Appendix C)

The District Court agreed with defendant and suppressed the evidence, in effect dismissing the claims against defendant. In Judge Denise Page Hood's memorandum opinion, the court noted that the reason Keeley "had his sight[s]" on defendant's vehicle was because it was parked in a "No-Parking Zone." However, the court went on to debunk the stated reasons due to the lack of citation involved, lack of approach to the van when the traffic offense was occurring, as well as the officer's other conflicting testimony (i.e. contradiction regarding the delay in pulling defendant over supposedly due to absence of back up, when Keeley in fact did pull over defendant without back up). (Appendix C)

Further, the court specifically dealt with the potential issue of LEIN checks by officers, by specifically noting that the LEIN check was not proper because the court DID NOT BELIEVE the officer that the reason he had checked the LEIN records was due to the traffic offense.

Indeed, the trial court specifically noted Keeley's lack of credibility:

> [T]he Court does not find Officer Keeley's testimony to be credible. The Court does not believe that Officer Keeley, on New Year's Eve, permitted a vehicle which was illegally parked to block traffic, including the

> officer's vehicle, for several minutes. It is also incredulous that Officer Keeley observed the van block traffic after the officer had driven past the vehicle, without so much as a warning to the driver of the vehicle, Mr. Coleman, of the violation. In addition, the Court does not find credence in Officer Keeley's assertion that he regularly observes traffic violations in the same manner. Officer Keeley's testimony in this regard was not believable. The Court also finds the officer's testimony, that the driver matched the description of Defendant Ellison, lacks credibility. The officer's testimony in this regard only supported that the driver was a black male, just like defendant Ellison, who is also a black male. The basis for the Court's disbelief of Officer Keeley's testimony relative to the circumstances leading up to Defendant Ellison's arrest was the manner in which the Officer delivered the testimony and his uncertainty regarding the substance of his testimony.[Appendix C]

On June 18, 2004, the district court entered an order and opinion granting Defendant's suppression motion. On July 20, 2004, Appellant filed its Notice of Appeal, its Certification of United States and Motion for Extension of Time, as the Notice of Appeal was untimely.

3. The Court of Appeals Decision

The Attorney General only argued that there was probable cause to perform a traffic stop before the District Court. However, at the Court of Appeals, the government espoused a new theory to resurrect their case:

That because a citizen has no privacy interest in their license plate, and officer may conduct a LEIN check for any reason – even apparently race based reasons. (Appendix A)

Defendant argued that this was not a case where an officer simply ran a license check on a car for no apparent reason; indeed, the officer stated the check was due to a traffic violation, a position which the District Court had found lacking in credibility. Indeed, it was argued that the Officer ran the LEIN check because he had observed two African-American men on New Year's Eve. In other words, the officer was engaged in racial profiling, thus making the check based on illegal race based grounds. (Appendix C)

Defendant also strongly argued that the government had failed to argue this new omnibus LEIN theory at the District Court (indeed, the government failed to respond in writing to defendant's motion at all), and that raising such an issue for the first time on appeal was improper.

The Court of Appeals agreed with the attorney general. The Court noted that there was no argument at the trial court regarding the issue of a privacy interest in a license plate, nor had the trial court made such a decision. However, the Court believed that the issue was "necessarily implied" by the decision of the lower court. (Appendix C)

Judge Karen Nelson Moore vehemently dissented from the opinion of the Court stating:

> The majority's decision is a textbook example of a court reaching to resolve an issue that is not properly before it. The majority opinion highlights how a court can undermine just results by choosing to address an argument-that an officer can run a license plate number through a computer database search without any heightened suspicion-despite its being raised for the first time on appeal without the legal or factual development necessary to resolve the issue.

> Because I believe that we cannot consider this matter on a ground raised by the government for the first time here on appeal without contravening this court's longstanding precedent, I respectfully dissent. I also write to express my concerns regarding the majority's conclusory gloss on the Fourth Amendment issues implicated by the license-plate database search and my disagreement with the majority's analysis of the equal protection claim. (Appendix C)

Judge Moore's analysis concentrated on three key issues:

1) No miscarriage of justice would occur in refusing to review the question raised for the first time on appeal by the government due to the trial court having never made a decision on further aspects of the Fourth Amendment Issue because the parties assumed that the LEIN check was a search under constitutional analysis.

2) The majority rested its conclusion that the Fourth Amendment was not implicated by the LEIN search on the relatively uncontroversial fact that the operator of a vehicle has no privacy interest in the particular combination of letters and numerals that make up his license-plate number, but paid short shrift to the crucial issue of how the license-plate information is used.

3) Disagreement with the majority that there was no evidence of racial animus in Keeley's

> decision to run defendant's license plates through a LEIN check, despite there being no other reason for him to do so with the debunking of his stated traffic stop rationale and circumstantial evidence surrounding the stop.

Defendant timely filed a motion for rehearing en banc, outlining further the equal protection rationale as well as bolstering the dissent of Judge Moore. However, the motion was denied January 17, 2007.

REASONS FOR GRANTING THE WRIT

It is without question that LEIN checks and other technological capabilities are important for law enforcement; however, control of those who wield these incredibly powerful devices is equally important. Such technological advances must be restrained by Constitutional concerns.

LEIN checks conducted solely because individuals are African-American (or any other group) do not fall within the constitutionally acceptable boundaries of law enforcement technology.

As pointed out in Judge Moore's dissent, such checks are potentially more invasive than being pulled over or questioned by authorities. As such, the outer constitutional limits on these capabilities must be ascertained and delineated by this Court.

Further, courts are intended to be neutral and detached magistrates; appellate courts especially so, reviewing the law with factual deference to the trial court, who is in the best position to judge credibility of witnesses. In the case at bar, the Court of Appeals allowed the government to raise a theory for the first time on appeal, effectively transforming the Court of Appeals into a second prosecutor. Considering the slant of American jurisprudence

toward the defendant in criminal matters, this acquiescence to the prosecutor is an affront to fairness and due process.

There are several specific reasons for granting this application for writ of certiorari.

1. The vacuum of authority concerning the proper analysis of racially discriminatory law enforcement regarding otherwise ostensibly legitimate investigation techniques has caused confusion since this Court's decision in Whren, which reaffirmed the prohibition against racially motivated enforcement, yet eliminated analysis of an officer's subjective intent.

It is well established that an officer's actual motivation for making a traffic stop is irrelevant to the constitutionality of that stop. Whren v. United States, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). However, the Court also noted, "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Whren*, 517 U.S. at 813.

Allegations of racial profiling are legion. Stopping motorists based solely on race is not a novel theory, nor confined to Oakland County, Michigan. As noted in the Washburn Law Review, a study by the New Jersey Attorney General of stops along the New Jersey Turnpike revealed that in radar/speed based stops, the percentage of African-American drivers who were stopped was consistent with their racial proportion of drivers. However, when discretionary stops were taken into account, eighty-eight percent involved minorities, and sixty-three percent of those same stops were black males thirty years old or younger. In New York, In

New York, the Attorney General conducted a study of 175,000 police encounters with pedestrians and discovered that African-Americans were stopped six times more frequently than whites. In predominately white areas where the African-American population comprised ten percent or less of the population, thirty percent of stops were of African-Americans. Williamson, L.W., PROFILING, PRETEXT, AND EQUAL PROTECTION: PROTECTING CITIZENS FROM PRETEXTUAL STOPS THROUGH THE FOURTEENTH AMENDMENT, 657 Washburn Law Journal 2003. In 1996 in Maryland, of the 732 citizens detained and searched by the Maryland State Police, 75% were African-Americans, and 5% were Hispanics. The Maryland numbers were analyzed by the individual officer; of the twelve officers involved, six stopped over 80% African-Americans, one stopped over 95% African-Americans, and two stopped only African-Americans. *Harris, infra.* a 1995 study by the National Association for the Advancement of Colored People concluded that "[p]olice officers have increasingly come to rely on race as the primary indicator of both suspicious conduct and dangerousness." See Slansky, David A., TRAFFIC STOPS, MINORITY MOTORISTS, AND THE FUTURE OF THE FOURTH AMENDMENT, 271 Supreme Court Review 1997. Michigan has not escaped the attention of scholarly writers in regards to such issues. See Carl J. Schifferle, AFTER WHREN v. UNITED STATES: APPLYING THE EQUAL PROTECTION CLAUSE TO RACIALLY DISCRIMINATORY ENFORCEMENT OF THE LAW, 2 Mich. L. & Pol'y Rev. 159 (1997).

Indeed, the purpose of Williamson in his Washburn Law Review article was to urge this Court to adopt standards and tests that could be applied such racial considerations:

> [The] United States Supreme Court must adopt a framework specifically to address this widespread problem. The Court has adopted a framework to address racial discrimination in *Batson v. Kentucky*, which added substance to the holding of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, and addressed discriminatory discretion in voir dire challenges. Arlington Heights and Batson allow a defendant to rely on one single incident to prove purposeful discrimination and should be applied to pretextual stops. Additionally, the Court must use Arlington Heights and current state case law as examples to allow the defendant to prove that the actions of the officer were purposeful and pretextual. Furthermore, the exclusionary rule must be applied as a remedy in order to prevent the Fourteenth Amendment from being a hollow promise.[*Id.* at 662]

Defendant echoes this widespread sentiment. The state of the law in this area has been somewhat unsettled since this Court's decision in *Whren*. Indeed, it is the fear that the police will not subject all drivers to traffic stops in the way *Whren* allows that has caused the most concern. Some authors have argued that if past practice is any indication, they will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics. See Harris, David A. "DRIVING WHILE BLACK" AND ALL OTHER TRAFFIC OFFENSES: THE SUPREME COURT AND PRETEXTUAL TRAFFIC STOPS 87 J. Crim. L. & Criminology 544 (1997). Further, as argued by Harris, equal protection will likely provide few of those subjected to this treatment with any solace under the

current framework; for each of the few successful suits brought to protest such racially biased enforcement practices, police could potentially stop and search thousands of people who have no hope of redress. Such individual often do not have the resources, knowledge, or wherewithal to complain. Further, many such aggrieved parties make unattractive plaintiffs unlikely to engender any jury's sympathy, regardless of the injuries to their rights. *Harris*, at 551. See also Harris, David A. THE STORIES, THE STATISTICS, AND THE LAW: WHY "DRIVING WHILE BLACK" MATTERS 265 Minnesota Law Journal (Dec 1999). The unavailability of evidence of racial discrimination in such cases is also practically insurmountable. When enforcement of a traffic regulation is a pretext for a criminal investigation, police rarely issue citations but simply give the driver an oral warning. Additionally, police typically fail to keep records of traffic stops which do not result in a ticket or the discovery of incriminating evidence. Even when relevant records do exist, they often do not report racial identity. *Schifferle, supra.*

Williamson, at 685-686 provided this eerily familiar hypothetical example of a police officer with racial motivations in support of his argument for a specific, more manageable test for racial profiling:

> One evening, during Officer Bob's shift, he observed two brothers, Marcus and Aaron, driving through a white suburban neighborhood in their cousin's new Honda Accord. As Officer Bob watched the brothers, he thought to himself "uh oh, two black boys . . . new car . . . they have to be up to something." Officer Bob followed the brothers for over three miles. The brothers stopped at a stop sign and turned right without signaling. Officer Bob immediately turned on his lights

and pulled over the teens. Officer Bob ordered the teens out of the car and to the ground. While the teens were on the ground, Officer Bob asked them if he could search their car. Feeling they had no other choice, they consented. During the search, he found crack-cocaine in the glove box. Marcus and Aaron told Officer Bob that the car was their cousin's and anything in there was his. At that point, he took the teens to jail without issuing a citation for the stop or even asking for identification. Marcus and Aaron were charged with possession of narcotics.

At trial, Marcus and Aaron sought to suppress the evidence because Officer Bob's search violated the Fourth Amendment. Specifically, they argued that Officer Bob did not have reasonable suspicion to pull them over, and the real reason they were stopped was because of their race. However, Officer Bob stated that the reason that he pulled the teens over was because they failed to signal when turning. The court relied on the United States Supreme Court's decision in Whren and stated that the search did not violate the Fourth Amendment because an officer's subjective intent plays no part in a Fourth Amendment analysis. Marcus and Aaron also challenged the stop as pretextual under the Fourteenth Amendment.

Following the proposed framework, they had to show that Officer Bob acted with a discriminatory purpose. They argued that the actions of the officer clearly showed that he acted with a discriminatory purpose. They pointed to the fact that he followed the vehicle

> for three miles; the teenagers were never questioned about the violation or even cited for a violation; the fact that Officer Bob immediately ordered the teenagers to the ground and asked for consent to search; and the fact that Officer Bob never asked for identification or insurance. The court held that, following the principle set forth in Arlington Heights and Batson, the defendant did not have to show how other drivers were treated or identify their race. The facts of this case established a discriminatory purpose.
>
> In response, Officer Bob maintained his original reason for stopping the teens. The court held, however, that because of the factors shown by the defendants, Officer's Bob justification was clearly contrary to the evidence presented in this case. Thus, the evidence was suppressed.

In the current case, however, the District Court specifically found that no traffic violation occurred, and indeed that the officer was not remotely credible. The only difference is that rather than following defendants for race purposes and waiting for a minor traffic violation to occur, Keeley instituted the LEIN check due to race considerations. In either event, the investigation was based on race, whether via license check or actual stop.

Defendant posits that there is no difference between such a stop and any other racially based investigation. In both cases, the officer relies upon otherwise proper probable cause to justify the stop – an eventual traffic offense or a LEIN check. It is what occurs BEFORE the existence of probable cause which is violative of equal protection.

As noted by *Williamson, supra*:

> [R]ace plays no factor in the true administration of justice. It is the courts who oversee this administration. In order for the officers to actually be deterred, the courts must not allow evidence obtained as a result of using race as a tool in traffic stops in a court of law. Not allowing the evidence preserves the judicial integrity of the courts. When one thinks of a judge, the words wisdom, integrity, and honor come to the forefront. The court has the duty to ensure that all citizens are afforded the protection guaranteed by the Fourteenth Amendment. Courts must use that wisdom, integrity, and honor in fulfilling its duty to watch the "constitutional rights of the citizen, and against any stealthy encroachments thereon."

The wholesale ability of police officers to target minorities, even with an otherwise ostensibly legitimate enforcement technique, is clearly contrary to the Equal Protection clause of the United States Constitution. This Court should grant this application and set out concrete boundaries for the exercise of this discretion.

2. Mistaken belief that a traffic violation has occurred as justification for a stop has been disallowed by other circuits, creating a split between the 6th Circuit and its sister Courts if applied to situations where LEIN checks are conducted.

It must be remembered that the District Court specifically found that no traffic violation occurred, based on the officer's lack of credibility. The only reason given by the

Keeley for running the LEIN check was the phantom violation. Applying the refusal of other circuits to allow "good faith" stops based on mistaken infractions sets up a potential conflict with the 6th Circuit in allowing the running of the LEIN check on a mistaken traffic offense.

For example, a misunderstanding of the law, justifiable as it may have been at the time, cannot validate an otherwise improper stop based on that infraction. See United States v. Twilley, 222 F.3d 1092 (9th Cir.2000). Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional. See, e.g., United States v. McDonald, 453 F.3d 958, 961-62 (7th Cir. 2006) (holding stop invalid where statute did not proscribe defendant's use of the turn signal); United States v. Chanthasouxat, 342 F.3d 1271, 1277-80 (11th Cir.2003) (finding no reasonable suspicion where applicable code did not require inside rear-view mirrors). But see United States v. Martin, 411 F.3d 998, 1001 (8th Cir.2005) (stating that "in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one" (citation and internal quotation marks omitted)).

In effect, the *motivating* factor of Officer Keeley in running the LEIN report – the traffic offense – is at best a mistake of law, and at worst an instance of racial discrimination. Analyzing this situation analogous to the motivating factor of a stop leads to the conclusion that the Sixth Circuit would join with the Eighth in allowing same, creating an arguable split among the circuits.

3. This type of case is likely to be repeated.

As noted, Whren specifically continued the prohibition against racially discriminatory law enforcement, yet provided no boundaries for the application of the Equal Protection clause to such claims. Thus, this question must

necessarily come before the Court under a case or controversy in order to lay these uncertainties to rest. This case is an ideal vehicle for such a review.

Further, it is clear that claims of racial profiling will continue to come before the Court. A voluminous and growing library of scholarly treatments of the issue attest to this issue, for example, David A. Harris, Whren v. United States: Pretextual Traffic Stops and 'Driving While Black,' The Champion, March 1997; Abraham Abramovsky and Jonathan I. Edelstein, Pretext Stops and Racial Profiling after Whren v. United States: The New York and New Jersey Responses Compared, 63 Alb. L. Rev. 725 (2000); David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265, 296 (1999); Phyllis W. Beck and Patricia A. Daly, State Constitutional Analysis of Pretext Stops: Racial Profiling And Public Policy Concerns, 72 Temp.L.Rev. 597 (1999).

Clearly this issue is not going to be resolved easily. However, the facts of this case create a unique opportunity for this Court to address not only the "would have" versus "could have" tests as decided in Whren, but also the "did" test of what the officer actually did.

4. The well-reasoned opinion of Judge Moore in her dissent is the proper analysis of the LEIN check under the Fourth Amendment and the Equal Protection Clause of the United States Constitution, especially when considered against the backdrop of the Court of Appeals acceptance of the attorney general's untimely forfeited argument.

STANDARD OF REVIEW

Determinations regarding trial court assessments of probable cause and reasonable suspicion involving traffic stops are reviewed de novo. These determinations should be

reviewed searchingly, in order to promote consistency of results, to give appellate courts control of the legal principles they propound, and to allow progressive clarification of the law. Further, reviewing courts should take care both to review findings of historical fact for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. Ornelas v. United States, 116 S.Ct 1657 (1996).

Courts are generally reluctant to set aside credibility determinations made by the trier of fact, who has had the opportunity to view the witness on the stand and assess his demeanor. Peveler v. United States, 269 F.3d 693, 702 (6th Cir. 2001). Additionally, courts must accept the findings of fact upon which the district court relied in ruling on a motion to suppress unless those findings are clearly erroneous. United States v. French, 974 F.2d 687, 691 (6th Cir.1992), cert. denied, 508 U.S. 934, 113 S.Ct. 2403, 124 L.Ed.2d 304 (1993).

I. THE COURT OF APPEALS IMPROPERLY ALLOWED THE ATTORNEY GENERAL TO PRESENT AN ISSUE ON APPEAL THAT HAD NOT BEEN RAISED AT THE TRIAL COURT, VIOLATING DEFENDANT'S DUE PROCESS RIGHTS.

It is axiomatic that the state has the burden of proof in a criminal case. Indeed, American jurisprudence has always favored the accused against the virtually unlimited resources of the state. Due process demands that the attorney general not be allowed a proverbial "second bite" at the apple after failing to respond in writing to defendants suppression motion and failing to raise the license plate LEIN argument in the trial court.

Judge Moore eloquently stated the appropriate analysis of this ostensibly forfeited/waived issue in her well reasoned dissent:

> [This is] a question of not just the plain view of the license plate but also the Fourth Amendment implications of conducting a subsequent search with the license-plate information on the computerized Law Enforcement Information Network ("LEIN"), it becomes clear that there are a multitude of fact questions that are essential to the resolution of this issue. For example, to assess properly the Fourth Amendment concerns raised by the use of the LEIN system, any court would need to know what type of information is available on the system; how this information is obtained; who can access the information; what safeguards, if any, are in place to prevent unauthorized access to the information; whether this information was available to police prior to the advent of the mobile data terminal ("MDT"); what the typical police practice is regarding the use of such searches; whether there are any procedures in place to guard against arbitrary searches; what options are available to regulate the use of the technology; what the government's interests are in conducting license-plate searches; what alternative practices could be used to achieve the same ends; the error rates associated with the use of the MDT technology; what practices, if any, are in place to ensure reliability and guard against errors; and the implications that such technology has for racial profiling. There is

little to no information in the record on these topics, nor did the parties brief the issue with these concerns in mind, and thus the court is ill-equipped to address the government's newly raised license-plate search argument. That answers to these factual questions are essential to addressing the Fourth Amendment issues implicated by the license-plate search becomes even more clear in the later discussion of the legal and factual assumptions the majority makes regarding the information available from the LEIN search.

Finally, the majority's assertion that "failing to consider the issue would result in a plain miscarriage of justice" because it would "allow[ ] a conclusion of law to stand that is clearly in error" is also misconceived. Maj. Op. at 561. Because this issue was not raised below, the district court merely stated in passing, without any detailed discussion or analysis, that the use of the LEIN search was improper because Ellison's van was not actually parked illegally. Dist. Ct. Op. at 8. Because both parties assumed that the LEIN check constituted a search for Fourth Amendment purposes, the district court had no occasion to consider the Fourth Amendment issues raised by the LEIN search, and thus its statement cannot be considered a legal conclusion on the matter. Rather, the statement simply highlights that the district court also adopted the parties' assumption, which the court needed to do to address the narrow issue before it, i.e., whether a parking violation had occurred. Therefore, no "plain

> miscarriage of justice," would result from us declining to address this issue. See United States v. Brignoni-Ponce, 422 U.S. 873, 886 n. 11, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (refusing to address "after-the-fact justification" for a search that was not clearly raised below). Despite having the opportunity to respond to this point, the majority makes no attempt to clarify its argument and merely clings to the unfounded assertion that an erroneous legal conclusion would stand were this court not to address the license-plate search argument. Given that no erroneous legal conclusion would be left standing were this court to decline to consider the license-plate search argument presented initially to us by the government, it would be a greater "miscarriage of justice" for this court to address this issue prematurely, without the legal and factual development necessary to resolve it. The majority's willingness to consider the license-plate search argument without fully contemplating the legal and factual questions it raises emphasizes the gaps in the majority's reasoning and the reach of its approach.

This Court should adopt Judge Moore's well reasoned dissent, which appropriately takes into account the elements required to sua sponte address an issue as well as protecting defendant's rights.

II. THE COURT OF APPEALS ERRED IN REFUSING TO TAKE INTO ACCOUNT THE RACIAL PROFILING ARGUMENTS OF DEFENDANT WHEN THE DISTRICT COURT FOUND THE

OFFICER'S REASONS FOR RUNNING A LEIN CHECK ON DEFENDANT'S VEHICLE COMPLETELY UNBELIEVABLE, FOR THE REASONS OUTLINED IN JUDGE MOORE'S DISSENT, AS RACIALLY MOTIVATED BACKGROUND CHECKS ARE PROHIBITED REGARDLESS OF THE PRIVACY INTEREST IN LICENSE PLATES UNDER THE EQUAL PROTECTION CLAUSE.

Although the Court of Appeals majority chose to dwell on the "newly minted" issue of the privacy interest in a license plate, Judge Moore in her dissent focused on the true issue at hand: the unfettered power of the police to focus their investigation on minorities for purely racial concerns.

The District Court did not make a finding of fact, or law, regarding defendant's contention that Keeley focused on the pair because they were African-American. Rather, the District Court noted that it simply did not believe practically any of Keeley's testimony, and noted that the only similarities between defendant and Coleman were that they were both African-American men, implicating a "They all look alike" attitude by Keeley. As he offered no other reason for conducting the LEIN search besides the traffic violation which had been debunked, for example no reason at all or random searching, there was simply no other reason available besides defendant's proffered racial discrimination argument. As noted by Judge Moore, this at least creates an inference of racial discrimination such as to require an evidentiary hearing on that issue.

Racially motivated police encounters are prohibited, even under existing Sixth Circuit precedent.

The Sixth Circuit has held that even consensual police encounters are prohibited, if based on racial motivations.

> It is one thing to sanction suspicionless police sweeps where, in "dragnet" fashion, officers descend on randomly gathered groups of individuals to question them and even request permission to search their belongings . . . It is quite another matter, however, to uphold police action that targets individuals for stopping and questioning on the basis of their race or ethnicity. Such police behavior is neither random nor indiscriminate. It is particularized and discriminatory.
>
> * * *
>
> A law enforcement officer would be acting unconstitutionally were he to approach and consensually interview a person of color solely because of that person's color, absent a compelling justification. Further, evidence seized in violation of the Equal Protection Clause should be suppressed. "[N]o distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted in either case." Elkins v. United States, 364 U.S. 206, 215 (1960)[U.S. v. Jennings, 985 F.2d 562 (6th Cir. 1993)(Unpublished)]

The initial motivation for initiating an investigation has been consistently constrained by Equal Protection Concerns:

> We first recognized in United States v. Taylor, that a "factually supported record of [the selection for interview because of race, a general practice or pattern that primarily

targeted minorities for consensual interviews, or a racial component in the drug courier profile] would have given rise to due process and equal protection constitutional implications cognizable by this court." 956 F.2d 572, 578 (6th Cir.), cert. denied, 506 U.S. 952, 113 S.Ct. 404, 121 L.Ed.2d 330 (1992). . . . The court stated, "***a law enforcement officer would be acting unconstitutionally were he to approach and consensually interview a person of color solely because of that person's color, absent a compelling justification***." [Citation omitted]. Adopting the position of the majority in Jennings, this court affirmatively held in Travis II, that consensual encounters may violate the Equal Protection Clause when initiated solely based on racial considerations. 62 F.3d at 173-74. It is therefore established in this circuit that the Fourteenth Amendment protects citizens from police action. [United States v. Avery, 137 F.3d 343 (1997) at 352-353]

A citizen's right to equal protection of the laws, however, does not magically materialize when he is approached by the police. Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion-undeniably, the right not to be exposed to the unfair application of the laws based on their race.

There are two questions that arise: (1) what of a case in which an officer initially targets someone solely because of his race, without additional factors, and because of the person's

> race the officer follows and investigates that person for drug trafficking; and (2) what about a situation where an airport police force has a defined policy of targeting only minorities for drug investigation? Such actions would be constitutionally impermissible, violative of the Equal Protection Clause. A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden.[Avery, supra, at 353-354]

Judge Moore specifically recognized this simple and easy legal premise in her opinion. However, Judge Moore is not alone. For example, in the Third Circuit, if a person can demonstrate that he was subjected to selective enforcement in violation of his Equal Protection rights, his conviction will be invalid, even though the Fourth Amendment reasonableness standard is not influenced by the subjective intentions of the person making the search or seizure. Gibson v. Superintendent of NJ Dept. of Law and Public Safety-Division of State Police, 411 F.3d 427 (3d Cir. 2005). Similarly, under the Equal Protection Clause, an officer is not held to a "suspicion of criminal activity standard" when he embarks to investigate someone; rather, the officer merely is prohibited from his pursuit if he acts based solely on race. U.S. v. Frazier, 408 F.3d 1102 (8th Cir. 2005), petition for cert. filed (U.S. Oct. 20, 2005).

This is a situation where the prime mover of the focus of the state on defendant was not based on any legitimate grounds. If instituting a consensual encounter cannot be based on racial motivation, then the arguably more intrusive inquiry into defendant's past as contained in LEIN records logically cannot be permissible either. At the very least, remand to the trial court is necessary for an evidentiary hearing into the allegations of racial profiling. However,

giving deference to the trial court, pure reversal is required. As noted by Judge Hood:

> The Court further finds based on the testimony elicited during the evidentiary hearing that the vehicle was not illegally parked and did not block any traffic, including the vehicle of Officer Keeley.[Exhibit C]

No other reasons were ever given for the search besides the false traffic violation. The record cannot be interpreted in the government's favor.

III. THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER THE FOURTH AMENDMENT ASPECTS INHERENT IN LICENSE PLATE LEIN SEARCHES.

Judge Moore's dissent took a decidedly different approach to the question of the privacy expectations in one's license plate in contrast to the information in state databases that can be accessed from the input of those identifiers:

> The majority rests its conclusion that the Fourth Amendment was not implicated by the LEIN search on the relatively uncontroversial fact that the operator of a vehicle has no privacy interest in the particular combination of letters and numerals that make up his license-plate number, but pays short shrift to the crucial issue of how the license-plate information is used.
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> * * *
>
> [I]t is worthwhile to spell out some of the Fourth Amendment concerns that the use of such technology raises, as no court of appeals

has yet done so. The use of a computer database to acquire information about drivers through their license-plate numbers without any heightened suspicion is in tension with many of the Fourth Amendment concerns expressed in Delaware v. Prouse, 440 U.S. 648, 655-63, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (cited with approval in Whren v. United States, 517 U.S. 806, 817-18, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). In Prouse, the Supreme Court held that an officer may not stop a vehicle to check the operator's license and registration without "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law," despite the fact that the state requires drivers to be licensed and vehicles to be registered. 440 U.S. at 663, 99 S.Ct. 1391. The Court stated that the Fourth Amendment aims "to safeguard the privacy and security of individuals against arbitrary invasions.... Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Id. at 654, 99 S.Ct. 1391 (internal quotations and citations omitted).

* * *

Although the license-plate search at issue here is arguably less invasive than a license-and-registration check, the constitutional concerns regarding abuse of discretion do not disappear simply because drivers are not stopped to

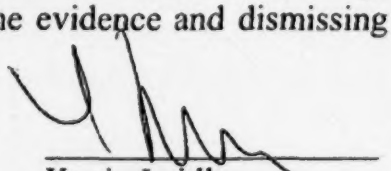
> conduct the license-plate search. First, a search can implicate the Fourth Amendment even when the individual does not know that she is being searched. FN6 Katz v. United States, 389 U.S. 347, 357-59, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Second, the balancing of Fourth Amendment interests also requires consideration of "psychological intrusion[s] visited upon" the individuals searched in assessing the extent of intrusion that a particular police practice imposes. See Prouse, 440 U.S. at 657, 99 S.Ct. 1391: The psychological invasion that results from knowing that one's personal information is subject to search by the police, for no reason, at any time one is driving a car is undoubtedly grave.

This Court should lend credence to Judge Moore's well reasoned concerns regarding LEIN checks in this increasingly technological age.

RELIEF REQUESTED

WHEREFORE, Petitioner Curtis Ellison respectfully requests this Court GRANT his petition for writ of Certiorari to the United States Sixth Circuit Court of Appeals in this case and order the affirmance of the order of District Judge Denise Page Hood suppressing the evidence and dismissing all claims against defendant.

Dated: April 16, 2007



Kevin Laidler
Counsel of Record

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462 F.3d 557

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES of America,
Plaintiff-Appellant,
v.

Curtis ELLISON,
Defendant-Appellee.

No. 04-1925.

Argued: Oct. 5, 2005.
Decided and Filed: Sept. 5, 2006.

Rehearing and Rehearing En Banc Denied Jan. 17, 2007.FN*

FN* Judge Moore would grant rehearing for the reasons stated in her dissent.

Before: MOORE, GIBBONS, and GRIFFIN, Circuit Judges.

GIBBONS, J., delivered the opinion of the court, in which GRIFFIN, J., joined. MOORE, J. (pp. 564-74), delivered a separate dissenting opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge.

Appellant United States appeals from a district court order granting defendant-appellee Curtis Ellison's motion to suppress. Because we conclude that the district court erred in

its Fourth Amendment analysis, we vacate the order granting the motion to suppress and remand for further proceedings.

I.

The central issue in this case is whether the Fourth Amendment is implicated when a police officer investigates an automobile license plate number using a law enforcement computer database. While on routine patrol, Officer Mark Keeley of the Farmington Hills (Michigan) Police Department pulled into a two-lane service drive adjacent to a shopping center. Keeley testified that a white van, with a male driver inside, was idling in the lane closest to the stores, in an area marked with "Fire Lane" and "No Parking" signs. Keeley did not issue the van a citation for being illegally parked, nor did he request that the driver move the van. Rather, he moved into a parking spot to observe the van and entered the vehicle's license plate number into his patrol car's Law Enforcement Information Network ("LEIN") computer. The LEIN search revealed that the vehicle was registered to Curtis Ellison, who had an outstanding felony warrant. Following standard procedure, Keeley radioed for back-up and continued observing the van. After two minutes, another male got into the van, and it drove away. Officer Keeley followed the van until his back-up was nearby, and then activated his lights and stopped the van.

Officer Keeley approached the driver's-side window as his back-up arrived. He advised the driver that he was being stopped for parking in a fire lane and asked for license, registration and proof of insurance. The driver, identified as Edward Coleman, stated that he had only stopped in front of the store to wait for the passenger. At this time the passenger stated that he was the registered owner of the vehicle. Keeley verified the passenger's identity as Curtis Ellison and moved to the passenger side of the van. Keeley notified Ellison that

he was being arrested on the outstanding warrant. Ellison stepped out of the van, and during the routine safety pat-down, two firearms were found. Coleman was released with a warning about parking in a fire lane.

Ellison was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Prior to trial, he made a timely motion to suppress the firearm as the fruit of an illegal search. After holding a hearing, the district court made a factual finding that the van was not parked illegally, and thus, the officer did not have probable cause to run the LEIN check of Ellison's license plate. The court issued a Memorandum Opinion and Order granting the motion to suppress under the "fruit of the poisonous tree" doctrine.

The government filed a timely appeal. This court has jurisdiction to hear the government's appeal from an order granting a motion to suppress evidence under 18 U.S.C. § 3731, as the government has certified that the appeal is not taken for the purposes of delay and that the evidence is a substantial proof of a fact material to the proceeding.

II.

[1] This court reviews a district court's decision on a motion to suppress evidence *560 under a dual standard. United States v. Hill, 195 F.3d 258, 264 (6th Cir.1999). Factual findings are reviewed for "clear error" and will only be set aside when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir.1999) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). As the government does not challenge the district court's finding that the van was not parked illegally, this appeal does not implicate any factual

findings. Rather, it concerns only legal conclusions, which are reviewed de novo. Hill, 195 F.3d at 264.

[2] The government argues on appeal that Ellison had no reasonable expectation of privacy in the information contained on his license plate, and thus, no probable cause was required for Officer Keeley to run the LEIN check. Ellison contends that the government waived this argument by not raising it in the district court. It is true that the government based its oral argument in the district court on the fact that the van was parked illegally, without addressing the specific interaction between license plate information and the Fourth Amendment.FN1 However, defendant's motion to suppress did not allege or argue a reasonable expectation of privacy. In fact, neither party made any argument in the district court regarding the expectation of privacy in a license plate. The discussion at the suppression hearing focused instead on probable cause-whether the van was parked illegally.

FN1. The government's written response to the motion made a general assertion that the stop and investigation were constitutional but did not specifically address whether there was a privacy interest in the information on the license plate.

[3] Although the district court did not expressly state that Ellison had a reasonable expectation of privacy in the information contained on his license plate, such a conclusion was necessarily implied by the court's ruling that a Fourth Amendment violation occurred. "[T]he State's intrusion into a particular area ... cannot result in a Fourth Amendment violation unless the area is one in which there is a 'constitutionally protected reasonable expectation of privacy.' " New York v. Class, 475 U.S. 106, 112, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986) (quoting Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)

(Harlan, J., concurring)). Thus, the district court could only find that the LEIN search violated the Fourth Amendment if it first concluded that Ellison had a 'constitutionally protected reasonable expectation of privacy' in his license plate number.

[4] Ellison correctly notes the long-standing rule that this court generally will not consider an argument not raised in the district court and presented for the first time on appeal. See, e.g., Foster v. Barilow, 6 F.3d 405, 408 (6th Cir.1993); United States v. Ovalle, 136 F.3d 1092, 1108 n. 17 (6th Cir.1998). An exception can be made, however, for "exceptional cases" or if failing to consider the argument would result in a "plain miscarriage of justice." Pinney Dock and Transport Co. v. Penn Central Corp., 838 F.2d 1445, 1461 (6th Cir.1988); In re Hood, 319 F.3d 755, 760 (6th Cir.2003), aff'd sub nom. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004). This is such an exceptional case. The question-whether a motorist has a privacy interest in his license plate-is a purely legal one.FN2 As the parties have fully *561 briefed the issue, it is "presented with sufficient clarity and completeness" to ensure a proper resolution. Pinney Dock, 838 F.2d at 1461. It requires no further development of the record at the district court level, and thus, Ellison will not be prejudiced by the inability to present evidence to that court. On the other hand, failing to consider the issue would result in a plain miscarriage of justice-namely, allowing a conclusion of law to stand that is clearly in error. Based on these factors, we consider the government's argument that the LEIN investigation of Ellison's license plate does not implicate the Fourth Amendment.

FN2. We are not persuaded by the dissent's attempt to create a factual issue where none exists. The questions posed by the

dissent, see Dis. Op. at 566-67, are not relevant to the question of whether the entry of Ellison's license plate number into the LEIN system constituted a "search" under the Fourth Amendment. See infra Part III.

III.

[5] This court has not previously addressed in a published opinion the question of whether an individual has a reasonable expectation of privacy in his license plate. In two unpublished decisions, however, this court has agreed with the other circuits that have decided this issue by holding that no such privacy interest exists. The reasoning of these opinions, as well as that of the Supreme Court in related cases, leads us to agree that a motorist has no reasonable expectation of privacy in the information contained on his license plate under the Fourth Amendment.

[6] [7] [8] A tenet of constitutional jurisprudence is that the Fourth Amendment protects only what an individual seeks to keep private. Katz, 389 U.S. at 351-52, 88 S.Ct. 507. "What a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." Id. at 351, 88 S.Ct. 507. It is also settled that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure ...." Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). Following this reasoning, the Court held that an automobile's Vehicle Identification Number, located inside the passenger compartment, but visible from outside the car, does not receive Fourth Amendment protection:

[I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile. The VIN's mandated visibility makes it more similar to the exterior of

the car than to the trunk or glove compartment. The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a "search."

Class, 475 U.S. at 114, 106 S.Ct. 960. Logically, this reasoning extends to a legally-required identifier located outside the vehicle.

No argument can be made that a motorist seeks to keep the information on his license plate private. The very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others. The reasoning in Class vis-a-vis Vehicle Identification Numbers applies with equal force to license plates: "[B]ecause of the important role played by the [license plate] in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the [license plate] is placed in plain view," a motorist can have no reasonable expectation of privacy in the information contained on it. 475 U.S. at 114, 106 S.Ct. 960 (discussing Vehicle Identification Numbers).

*562 The dissent implies that even if an individual has no expectation of privacy in a license plate number, a privacy interest is somehow created by the entry of this information into a law-enforcement computer database. This argument flies in the face of established Fourth Amendment doctrine. First, despite the dissent's concerns over the information available in a LEIN search, Ellison had no privacy interest in the information retrieved by Officer Keely. The obvious purpose of maintaining law enforcement databases is to make information, such as the existence of outstanding warrants, readily available to officers carrying out legitimate law enforcement duties. The dissent fails to state how using a license plate number-in which there is no expectation of privacy-to retrieve other non-private information somehow

creates a "search" for the purposes of the Fourth Amendment.FN3 Moreover, the computer investigation utilized in this case was far less invasive than other government actions that fall outside the protections of the Fourth Amendment. See, e.g., Oliver v. United States, 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (entering private property with "No Trespassing" signs to observe marijuana plants in an "open field" not visible from outside the property); Dow Chemical Co. v. United States, 476 U.S. 227, 239, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986) (photographing an industrial complex with a precision aerial mapping camera); California v. Ciraolo, 476 U.S. 207, 213-14, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (using aerial surveillance in public airspace to observe the curtilage of a private residence); Smith v. Maryland, 442 U.S. 735, 745-46, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) (placing a pen register on a phone line to record the numbers dialed from a private residence). This is not a case where the police used a technology not available to the public to discover evidence that could not otherwise be obtained without "intrusion into a constitutionally-protected area." Kyllo v. United States, 533 U.S. 27, 34-35, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (holding that the use of thermal-imaging technology to detect heat inside a private home violates the Fourth Amendment). The technology used in this case does not allow officers to access any previously-unobtainable information; it simply allows them to access information more quickly. As the information was obtained without intruding upon a constitutionally-protected area, *563 there was no "search" for Fourth Amendment purposes.

FN3. The website of the Michigan State Police contains the following information about the LEIN system:

The Michigan Law Enforcement Information Network (LEIN) is a statewide computerized information system,

which was established July 1, 1967, as a service to Michigan's criminal justice agencies. The goal of LEIN is to assist the criminal justice community in the performance of its duties by providing and maintaining a computerized filing system of accurate and timely documented criminal justice information readily available to all criminal justice agencies.

* * * * * *

LEIN access is permitted to criminal justice agencies in the discharge of their official, mandated responsibilities.

See Michigan State Police, "LEIN Field Services," at http:// www.michigan.gov/msp/0,1607,7-123-1564-16248-,00.html (last accessed Aug. 18, 2006). While we would be justified in taking judicial notice of this information, see Fed.R.Evid. 201, it is unnecessary to do so to dispose of this appeal. The above quote amply illustrates, however, the fallacy of the dissent's argument that one has an expectation of privacy in a license plate number or the existence of an outstanding arrest warrant. The dissent's further attempt to impugn all LEIN checks based on "the possibility and the reality of errors in the computer databases accessed by [LEIN-type] systems" amounts to pure speculation and is no way relevant to whether one has an expectation of privacy.

Every court that has addressed this issue has reached the same conclusion. The Tenth Circuit has held on two occasions that license plates are "in plain view on the outside of the car" and thus, are "subject to seizure" because there is no reasonable expectation of privacy. United States v. Matthews, 615 F.2d 1279, 1285 (10th Cir.1980); see also United States v. Walraven, 892 F.2d 972, 974 (10th Cir.1989). The Fifth Circuit has also held that "[a] motorist has no privacy interest in her license plate number." Olabisiomotosho v. City of Houston, 185 F.3d 521, 529 (5th

Cir.1999); accord United States v. Sparks, 37 Fed.Appx. 826, 829 (8th Cir.2002); Hallstein v. City of Hermosa Beach, 87 Fed.Appx. 17, 19 (9th Cir.2003). The only two panels of this court to address the question have reached the same result. United States v. $14,000.00 in U.S. Currency, No. 98-4380, 2000 WL 222587, at *3 (6th Cir. Feb.14, 2000) (finding no Fourth Amendment violation in a computer check of a license plate); United States v. Batten, 73 Fed.Appx. 831, 832 (6th Cir.2003) (same). As one panel wrote, "[T]here is no case law indicating that there can be any reasonable expectation of privacy in license plates which are required by law to be displayed in public on the front and rear of any vehicle on a public street." Batten, 73 Fed.Appx. at 832; see also Wayne R. LaFave, 1 Search & Seizure § 2.5(b) (4th ed. 2004) ("[I]t is apparent that when a vehicle is parked on the street or in a lot or at some other location where it is readily subject to observation by members of the public, it is no search for the police to look at the exterior of the vehicle.") (citing Katz and Olabisiomotosho).

Thus, so long as the officer had a right to be in a position to observe the defendant's license plate, any such observation and corresponding use of the information on the plate does not violate the Fourth Amendment. In this case, Officer Keeley had a right to be in the parking lot observing the van-he was in a public place conducting a routine patrol. The district court's finding that the van was not parked illegally is thus irrelevant-such a finding goes only to probable cause, which is not necessary absent a Fourth Amendment privacy interest.FN4 Once Officer Keeley conducted the check and discovered the outstanding warrant, he then had probable cause to pull over the vehicle and arrest the man identified as Ellison. The arrest and resulting search during which the handguns were found in no way violated the Fourth Amendment, and the district court's order granting the motion to suppress was in error.

FN4. This court suggested in $14,000.00 in U.S. Currency that it would violate the Equal Protection Clause of the Fourteenth Amendment for an officer to run computer checks in an "intentionally racially discriminatory manner." 211 F.3d 1270, 2000 WL 222587 at *3 n. 2 (citing United States v. Travis, 62 F.3d 170, 174 (6th Cir.1995)). Ellison makes a brief argument on appeal that racial profiling occurred in this case, and the dissent surmises that Officer Keeley must have had a discriminatory racial motivation because the district court disbelieved his proffered rationale for running the LEIN check. The dissent offers no support for this speculation, however, because the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black. While the dissent seeks to differentiate between our treatment of this issue and the analysis of the privacy issue, the complete lack of evidence to support a racial profiling argument obviates the need for any further discussion of it.

IV.

For the foregoing reasons, we vacate the order granting the motion to suppress and remand the case to the district court for *564 further proceedings consistent with this opinion.

KAREN NELSON MOORE, Circuit Judge, dissenting.
The majority's decision is a textbook example of a court reaching to resolve an issue that is not properly before it. The majority opinion highlights how a court can undermine just results by choosing to address an argument-that an officer can run a license plate number through a computer database search without any heightened suspicion-despite its being raised for the first time on appeal without the legal or factual development necessary to resolve the issue. Because I believe that we cannot consider this matter on a ground raised by the

government for the first time here on appeal without contravening this court's longstanding precedent, I respectfully dissent. I also write to express my concerns regarding the majority's conclusory gloss on the Fourth Amendment issues implicated by the license-plate database search and my disagreement with the majority's analysis of the equal protection claim.

I. BACKGROUND

On December 31, 2003, Officer Mark Keeley ("Keeley") of the Farmington (Michigan) Police stopped Curtis Ellison's vehicle, in which Ellison was riding as a passenger. During this stop, firearms were found on Ellison, and he was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Ellison moved to suppress the firearms evidence, claiming that the circumstances of the stop violated the Fourth Amendment. The government claimed that there was probable cause for the stop because the driver of the vehicle, Edward Coleman ("Coleman"), had committed a parking violation. After a suppression hearing, the district court ruled that Coleman had not committed a parking violation, and thus that the evidence should be suppressed as the fruit of an illegal stop. On appeal, the government abandoned its argument that there was probable cause to stop the vehicle based upon a parking infraction. Instead, the government argues, for the first time, that the license-plate database search conducted from the officer's car did not implicate the Fourth Amendment and thus that the stop was independently justified by the information regarding Ellison's outstanding felony warrant that was discovered through the license-plate search. I will refer to this newly minted Fourth Amendment argument as the "license-plate search argument."

II. FOURTH AMENDMENT CLAIM

A. Consideration of an Argument Raised for the First Time on Appeal

The majority's reaching out to decide this Fourth Amendment question on a basis that the government failed to raise below contradicts legal authority, the interests of justice, and the principle of judicial restraint. Relying on Pinney Dock, the majority decides that the government's argument warrants an exception to the general rule that arguments not raised below will not be considered on the grounds that it raises a purely legal issue that has been " 'presented with sufficient clarity and completeness' to ensure a proper resolution" and that "failing to consider the issue would result in a plain miscarriage of justice." Majority Opinion ("Maj. Op.") at 560 (quoting Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1461 (6th Cir.1988)). However, the majority's conclusion misconceives the governing precedent and the nature of the issue before us.

*565 First, in its attempt to fit the license-plate search argument within the parameters of the Pinney Dock exception, the majority misapplies Pinney Dock. Pinney Dock held that this court generally will not consider issues not addressed below, except for " 'exceptional cases or particular circumstances,' " or when adherence to the rule would result in " 'a plain miscarriage of justice.' " 838 F.2d at 1461 (quoting Hormel v. Helvering, 312 U.S. 552, 557, 61 S.Ct. 719, 85 L.Ed. 1037 (1941)) (emphasis added). In Pinney Dock, we decided to address the new issue for two reasons: (1) because it was "presented with sufficient clarity and completeness," and (2) because "its resolution w[ould] materially advance the progress of this already protracted litigation." 838 F.2d at 1461. Neither of these conditions applies to the government's license-plate search argument. Based on the majority's incomplete view of how the license-

plate search implicates the Fourth Amendment, its cursory conclusion that this is a pure legal issue " 'presented with sufficient clarity and completeness,' " Maj. Op. at 561 (quoting Pinney Dock, 838 F.2d at 1461), may appear correct at first blush. However, once the issue is framed accurately, that is, as a question of not just the plain view of the license plate but also the Fourth Amendment implications of conducting a subsequent search with the license-plate information on the computerized Law Enforcement Information Network ("LEIN"), FN1 it becomes clear that there are a multitude of fact questions that are essential to the resolution of this issue. For example, to assess properly the Fourth Amendment concerns raised by the use of the LEIN system, any court would need to know what type of information is available on the system; how this information is obtained; who can access the information; what safeguards, if any, are in place to prevent unauthorized access to the information; whether this information was available to police prior to the advent of the mobile data terminal ("MDT") FN2; what the typical police practice is regarding the use of such searches; whether there are any procedures in place to guard against arbitrary searches; what options are available to regulate the use of the technology; what the government's interests are in conducting license-plate searches; what alternative practices could be used to achieve the same ends; the error rates associated with the use of the MDT technology; what practices, if any, are in place to ensure reliability and guard against errors; and the implications that such technology has for racial profiling. There is little to no information in the record on these topics,FN3 nor did the parties brief the *566 issue with these concerns in mind, and thus the court is ill-equipped to address the government's newly raised license-plate search argument. That answers to these factual questions are essential to addressing the Fourth Amendment issues implicated by the license-plate search becomes even more clear in the later discussion of the legal

and factual assumptions the majority makes regarding the information available from the LEIN search.

FN1. This aspect of the license-plate search is addressed more fully in the main text below.

FN2. A mobile data terminal ("MDT") is a "remote portable computer" that "enables the transmission of data between the MDT and a host computer system," allowing the police access to a multitude of information about a vehicle and its owner by entering in the vehicle's license-plate number. See generally Darlene Cedrés, Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement, 23 Rutgers Computer & Tech. L.J. 391, 395-97 (1997). MDTs can access databases such as those maintained by a state's department of motor vehicles and the FBI's National Crime Information Center ("NCIC"). Id. at 396. The information accessible by a license-plate search using an MDT can include the vehicle's registration information and the driver's name, address, social security number, license status, prior arrests, convictions, outstanding warrants, and even age, physical characteristics, and race. See id. at 396-97; New Jersey v. Donis, 157 N.J. 44, 723 A.2d 35, 36 (N.J.1998).

FN3. Although there is a brief exchange at the suppression hearing regarding the information that Keeley obtained from the LEIN system, J.A. at 94-97 (Keeley Hr'g Tr. at 61-64), it is insufficient to analyze the Fourth Amendment issues implicated by the license-plate search.

Finally, the majority's assertion that "failing to consider the issue would result in a plain miscarriage of justice" because it would "allow[ ] a conclusion of law to stand that is clearly in error" is also misconceived. Maj. Op. at 561. Because this issue was not raised below, the district court merely stated in

passing, without any detailed discussion or analysis, that the use of the LEIN search was improper because Ellison's van was not actually parked illegally. Dist. Ct. Op. at 8. Because *both parties assumed that the LEIN check constituted a* search for Fourth Amendment purposes, the district court had no occasion to consider the Fourth Amendment issues raised by the LEIN search, and thus its statement cannot be considered a legal conclusion on the matter. Rather, the statement simply highlights that the district court also adopted the parties' assumption, which the court needed to do to address the narrow issue before it, i.e., whether a parking violation had occurred. Therefore, no "plain miscarriage of justice," would result from us declining to address this issue. See United States v. Brignoni-Ponce, 422 U.S. 873, 886 n. 11, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (refusing to address "after-the-fact justification" for a search that was not clearly raised below). Despite having the opportunity to respond to this point, the majority makes no attempt to clarify its argument and merely clings to the unfounded assertion that an erroneous legal conclusion would stand were this court not to address the license-plate search argument. Given that no erroneous legal conclusion would be left standing were this court to decline to consider the license-plate search argument presented initially to us by the government, it would be a greater "miscarriage of justice" for this court to address this issue prematurely, without the legal and factual development necessary to resolve it. The majority's willingness to consider the license-plate search argument without fully contemplating the legal and factual questions it raises emphasizes the gaps in the majority's reasoning and the reach of its approach.

B. Merits of the Fourth Amendment Claim

Although I believe that the government's license-plate search argument is not properly before this court and thus should not

be considered, the majority's decision compels me to highlight the shortcomings of its woefully incomplete Fourth Amendment analysis. The majority rests its conclusion that the Fourth Amendment was not implicated by the LEIN search on the relatively uncontroversial fact that the operator of a vehicle has no privacy interest in the particular combination of letters and numerals that make up his license-plate number, but pays short shrift to the crucial issue of how the license-plate information is used. Based on this half-conceived understanding of the issues presented by the LEIN search, the majority then unconvincingly pins its conclusion on New York v. Class, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986), which deals only with the physical search of the interior of a car to determine a VIN number and does *567 not address the issue of the use of such a number to ascertain other information associated with the vehicle or its operator.FN4 This approach misses the crux of the issue before the court: even if there is no privacy interest in the license-plate number per se, can the police, without any measure of heightened suspicion or other constraint on their discretion, conduct a search using the license-plate number to access information about the vehicle and its operator that may not otherwise be public or accessible by the police without heightened suspicion?

FN4. Therefore, Class is not controlling on the question before this court, and the outcome in this case is governed by no prior precedent. The only other cases cited by the majority are decisions of our sister circuits and the unpublished opinions of this court, each of which is considered only insofar as it is persuasive. None of these cases relied on by the majority is persuasive. In one such case, the license-plate information there was not run through a computer system. United States v. Matthews, 615 F.2d 1279, 1285 (10th Cir.1980). In another case, which is unpublished, the court was faced with a question similar to the one here, but the

analysis was inadequate, resting only on the conclusion that there is no privacy interest in the license-plate number without providing any Fourth Amendment analysis regarding the information's further use in the computer search system. See United States v. Sparks, 37 Fed.Appx. 826, 829 (8th Cir.2002). The remaining courts of appeals opinions, two of which are unpublished, address the crucial question of the use of the license-plate information to conduct an additional search in just one sentence and without citation to any authority. See United States v. $14,000 in U.S. Currency, No. 98-4380, 2000 WL 222587, *3 (6th Cir. Feb.14, 2000); Hallstein v. City of Hermosa Beach, 87 Fed.Appx. 17, 19 (9th Cir.2003); Olabisiomotosho v. City of Houston, 185 F.3d 521, 529 (5th Cir.1999); United States v. Walraven, 892 F.2d 972, 974 (10th Cir.1989). The perfunctory and conclusory treatment of the issue leaves these cases devoid of any ability to persuade.

Although neither the posture of this issue nor the record before us allows for consideration of the Fourth Amendment implications raised by the LEIN search, it is worthwhile to spell out some of the Fourth Amendment concerns that the use of such technology raises, as no court of appeals has yet done so. The use of a computer database to acquire information about drivers through their license-plate numbers without any heightened suspicion is in tension with many of the Fourth Amendment concerns expressed in Delaware v. Prouse, 440 U.S. 648, 655-63, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (cited with approval in Whren v. United States, 517 U.S. 806, 817-18, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). In Prouse, the Supreme Court held that an officer may not stop a vehicle to check the operator's license and registration without "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law," despite the fact that the state

requires drivers to be licensed and vehicles to be registered. 440 U.S. at 663, 99 S.Ct. 1391. The Court stated that the Fourth Amendment aims "to safeguard the privacy and security of individuals against arbitrary invasions.... Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." FN5 Id. at 654, 99 S.Ct. 1391 (internal quotations and citations omitted). The Court then explained the constitutional *568 concerns that flow from the unbridled discretion associated with permitting random searches of drivers' information:

FN5. The Court later explained that such a balancing analysis for Fourth Amendment claims is appropriate where the search or seizure was not justified by probable cause or was "conducted in an extraordinary manner." Whren, 517 U.S. at 817-18, 116 S.Ct. 1769. A balancing analysis is proper for this claim because the LEIN search was conducted without probable cause.

To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches ...." Terry v. Ohio, 392 U.S. [1], at 22, 88 S.Ct. 1868, 20 L.Ed.2d 889 [1968].... When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations-or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered-we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and

unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent....

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

Id. at 661-63, 99 S.Ct. 1391.

Although the license-plate search at issue here is arguably less invasive than a license-and-registration check, the constitutional concerns regarding abuse of discretion do not disappear simply because drivers are not stopped to conduct the license-plate search. First, a search can implicate the Fourth Amendment even when the individual does not know that she is being searched. FN6 Katz v. United States, 389 U.S. 347, 357-59, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Second, the balancing of Fourth Amendment interests also requires consideration of "psychological intrusion[s] visited upon" the individuals searched in assessing the extent of intrusion that a particular police practice imposes. See Prouse, 440 U.S. at 657, 99 S.Ct. 1391. The psychological invasion that results from knowing that one's personal

information is subject to search by the police, for no reason, at any time one is driving a car is undoubtedly grave. See Sam L. Amirante, People v. Barnes-George Orwell's 1984 Revisited: Unbridled and Impermissible Police Use of Computer Power in the Modern Age, 28 Loy. U. Chi. L.J.J. 667, 676-77 (1997); Darlene Cedrés, *569 Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement, 23 Rutgers Computer & Tech. L.J. 391, 405 (1997).

FN6. Therefore, the attempt by two of our sister circuits to justify license-plate searches on the basis that unless the search results in suspicious information, the subject of the search "remains unaware of the check and unencumbered," Walraven, 892 F.2d at 974; Olabisiomotosho, 185 F.3d at 529, is unavailing.

Because the government incorrectly limits its Fourth Amendment analysis to the plain view of the license plate without exploring the constitutional implications of the subsequent LEIN search, it does not provide any explanation as to the governmental interests promoted by license-plate searches. However, the government's potential interest in law enforcement would not, without more, justify the intrusion, as "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." Almeida-Sanchez v. United States, 413 U.S. 266, 273, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).FN7 Nor could an interest in public safety alone legitimate the practice of random license-plate searches. In Prouse, the Supreme Court held that the suspicionless license-and-registration check was an "[in]sufficiently productive mechanism" to support the government's asserted

interest in public safety because it provided little benefit beyond "[t]he foremost method of enforcing traffic and vehicle safety regulations ..., acting upon observed violations[,]" and thus the additional intrusion into drivers' privacy was not justified. 440 U.S. at 659, 99 S.Ct. 1391. Therefore, the Court concluded that "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure-limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable-at the unbridled discretion of law enforcement officials." Id. at 661, 99 S.Ct. 1391.

FN7.

"These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

Almeida-Sanchez, 413 U.S. at 274, 93 S.Ct. 2535 (quoting Brinegar v. United States, 338 U.S. 160, 180, 69 S.Ct. 1302, 93 L.Ed. 1879 (Jackson, J., dissenting)).

In addition, the possibility and the reality of errors in the computer databases accessed by MDT systems lead to great concern regarding the potential for license-plate searches to result in unwarranted intrusions into privacy in the form of stops made purely on the basis of incorrect information. See Albert J. Meehan & Michael C. Ponder, Race and Place: The Ecology of Racial Profiling African American Motorists, 19 JUST. Q. 399, 407 n. 8 (2002) (stating that MDT "error is particularly serious, since evidence suggests that the 'benefit

of the doubt' in questionable circumstances is usually given to the computer," and "fewer than half the 50 states require updating criminal history files to include dismissals and acquittals," "only 13 states require random audits to ensure accuracy," but "all the states require the entry of arrests"); Cedrés, at 401-02 (noting that "much of the information contained in public databases is inaccurate or outdated"). Although more data is necessary to assess the rate of errors using license-plate searches, this has been raised as a serious concern by a number of justices in Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), which considered whether the exclusionary rule applied to contraband discovered during an arrest resulting from erroneous information*570 derived from an MDT search. FN8 Justice Ginsburg discussed the dangers associated with the use of MDT technology:

FN8. The Court in that case had no occasion to consider the constitutionality of the use of MDT technology to conduct random license-plate searches because the stop in that case was justified by a traffic violation and the MDT search was conducted after Evans was stopped and told the officer that his license was suspended. See Evans, 514 U.S. at 4, 115 S.Ct. 1185.

Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. Most germane to this case, computerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the database. The computerized data bases of the Federal Bureau of Investigation's National Crime Information Center (NCIC), to take a conspicuous example, contain over 23 million

records, identifying, among other things, persons and vehicles sought by law enforcement agencies nationwide.... NCIC information is available to approximately 71,000 federal, state, and local agencies.... Thus, any mistake entered into the NCIC spreads nationwide in an instant.

Isaac Evans' arrest exemplifies the risks associated with computerization of arrest warrants. Though his arrest was in fact warrantless[,] ... the computer reported otherwise. Evans' case is not idiosyncratic.

Id. at 26-27, 115 S.Ct. 1185 (Ginsburg, J., joined by Stevens, J., dissenting on the basis of whether there was an independent and adequate state law ground for the state court's decision) (citations omitted); see also id. at 17-18, 115 S.Ct. 1185 (O'Connor, J., joined by Souter & Breyer, JJ., concurring) (asserting that the police's reliance on "powerful, computer-based recordkeeping systems that facilitate arrests" places on the police "the burden of corresponding constitutional responsibilities," including implementing a "mechanism to ensure [the recordkeeping system's] accuracy"); id. at 22-23, 115 S.Ct. 1185 (Stevens, J., dissenting) (emphasizing "that computer error poses ... [an] appreciable threat to Fourth Amendment interests," and expressing outrage at the notion of arrests resulting from computer error). Although these computer databases are used for a variety of purposes, allowing the information contained therein to form the basis for a seizure without any other heightened suspicion, let alone probable cause, compounds the risk of privacy intrusions that errors in these databases impose. The majority's hasty approach to the license-plate search argument without the necessary legal and factual development is all the more inappropriate in the face of these serious countervailing constitutional concerns.

In attempting to counter the Fourth Amendment concerns raised by the use of suspicionless license-plate searches, the majority repeatedly asserts facts and states legal principles that are entirely unsupported. For example, the majority states that there is "no privacy interest in the information retrieved by Officer Keely. The obvious purpose of maintaining law enforcement databases is to make information, such as the existence of outstanding warrants, readily available to officers carrying out legitimate law enforcement duties." Maj. Op. at 562. The majority offers nothing to support these assertions. Indeed, given that the district court properly found that there was no probable cause to stop the vehicle based upon a *571 parking infraction, it cannot be said that the officers were "carrying out legitimate law enforcement duties." The majority then relies on these unsupported statements to assume that all of the information retrieved from the LEIN search is "non-private." Id. The only support the majority offers here is a footnote mentioning-but explicitly not relying on-a website of the Michigan State police. However, as explained earlier, there is minimal evidence in the record and no explanation in the briefs as to what information is available from the LEIN search, and we simply do not know who ordinarily has access to the information retrievable from the LEIN search. The majority also asserts that "[t]he technology used in this case does not allow officers to access any previously-unobtainable information; it simply allows them to access information more quickly." Maj. Op. at 563. The majority makes no effort to support this assertion, and there is no evidence in the record regarding the sort of information accessed from a license-plate search using an MDT as compared to the information accessible to the police prior to the advent of this technology. Again, the majority's assumption contravenes the available information, which suggests that the MDT technology transformed, in practice, the amount and nature of information accessed by the officer in the field. See Meehan

& Ponder, at 406-07; Cedrés, at 397-98. These unresolved factual questions are precisely why we should not, and indeed cannot, address this newly raised issue for the first time on appeal.

The majority also makes legal assumptions that are without any authority. The majority does not explain its assertion that the LEIN search only permits officers to access already accessible information more quickly, let alone does the majority specify through which procedure the police are permitted to access this information or provide any legal authority to support the conclusion that these other unspecified procedures do not implicate the Fourth Amendment. The majority simply presumes, without any analysis or citation to authority, that the information that is accessible through a LEIN search is otherwise available to the police without any heightened suspicion. The New Jersey Supreme Court, in addressing a challenge to random MDT searches as violative of the New Jersey Constitution, held that suspicionless searches using MDTs gave police unwarranted access to private information and thus that the MDTs must be reprogrammed so that officers could only access personal information if the officer's inquiry revealed a reason for further police action, for instance, if the vehicle had been reported stolen. Donis, 723 A.2d at 40. The New Jersey Supreme Court therefore acknowledged that there was a privacy interest in the information that police could obtain through an MDT search: the court stated that "[w]ith the reprogrammed MDTs, police officers who were using MDTs at random and who lacked suspicion could access only non-private information." Id.; see also Kevin C. Wille, State v. Donis: The New Jersey Supreme Court Turns Its Back While Police Conduct Random Mobile Data Terminal Searches, 17 J. Marshall J. Computer & Info. L.. 1235, 1252 (1999). As the New Jersey Supreme Court makes clear, mere prevalence of a practice is insufficient to support its constitutionality,

particularly when the practice has not been challenged. See Donis, 723 A.2d at 40.

In sum, in light of these significant Fourth Amendment concerns outlined above, it is wholly unwise to reach out to address the government's newly minted license-plate search argument and to decide the issues as the majority has done. I would leave the question to be resolved in *572 a case where it is properly raised, developed with supporting evidence, and briefed and resolved first in the district court.

III. FOURTEENTH AMENDMENT RACE DISCRIMINATION CLAIM

Ellison argues that even if the license-plate search did not violate his Fourth Amendment rights, it would violate his right to equal protection if the officers conducted the license-plate search because he is black.FN9 Police crime-detection activity that does not implicate the Fourth Amendment can violate the Equal Protection Clause of the Fourteenth Amendment if that activity is motivated by race. See Farm Labor Organizing Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 533 (6th Cir.2002); United States v. Avery, 137 F.3d 343, 352-53 (6th Cir.1997); United States v. Travis, 62 F.3d 170, 173-74 (6th Cir.1995). This court has held that a consensual search, which itself does not violate the Fourth Amendment, violates the Equal Protection Clause if it was initiated on the basis of race. Travis, 62 F.3d at 173-74. We extended this Fourteenth Amendment protection to an officer's decision regarding whom to target for surveillance, explaining that "[c]itizens are cloaked at all times with the right to have the law applied to them in an equal fashion-undeniably, the right not to be exposed to the unfair application of the laws based on their race." Avery, 137 F.3d at 353. Just as "all individuals possess the constitutional right to equal protection as they walk through America's airports,"

so too do individuals possess the right to equal protection as they operate cars on America's thoroughfares. Id. at 353-55. An unpublished opinion of this court recognized the application of the Equal Protection Clause to the circumstances now before us: license-plate searches conducted on the basis of race. See United States v. $14,000.00 in U.S. Currency, No. 98-4380, 2000 WL 222587, at *3 n. 2 (6th Cir. Feb.14, 2000).

FN9. It is appropriate for us to consider this argument even if Ellison did not raise it below. "[T]he general rule ... that a federal appellate court does not consider an issue not passed upon below ... applies to a party seeking reversal." Pinney Dock, 838 F.2d at 1461 & n. 16. " 'The prevailing party may ... assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.' " Id. at 1461 n. 16 (quoting Dandridge v. Williams, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)). On this basis, we have previously held that an appellee can raise an argument in support of the judgment that was not raised below. W.G. Fairfield Co. v. Occupational Safety & Health Review Comm'n, 285 F.3d 499, 504 (6th Cir.2002).

The majority rejects Ellison's constitutional race discrimination claim because, in its view, "the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black." Maj. Op. at 563 n. 4. This assertion ignores circumstantial evidence in the record that Keeley may have zeroed in on Ellison because of his race and our prior admonition that "[o]ften it is difficult to prove directly the invidious use of race," and thus " 'an invidious discriminatory purpose may often be inferred from the totality of the relevant facts....' " Avery, 137 F.3d at 355 (quoting Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)).

Keeley's asserted reason for running the LEIN check on Ellison, the parking violation, was found to be untrue by the district court. Dist. Ct. Op. at 7-8. While Keeley claimed that the van was blocking a fire lane and blocking traffic, Keeley testified that he took no action to notify the driver *573 of the van of this civil infraction to rectify the situation. J.A. at 77 (Keeley Hr'g Tr. at 44). Although Keeley claimed that he took no action because "at times people drop people off and they quickly get in, get back into the vehicle or proceed to the nearest parking location," J.A. at 78 (Keeley Hr'g Tr. at 45), this also conveniently allowed Keeley time to run the LEIN search of the van's license plate. If Keeley's concern was the parking violation and the blocked fire lane and traffic, there is no reason why he would not want to try to get the vehicle to move immediately.FN10 The implausibility of Keeley's explanation and the district court's finding that he was not credible suggests that there was another motivation for Keeley's actions.

FN10. Keeley testified that he had issued parking tickets to others who had committed parking violations in the parking lot where he found Ellison's van. J.A. at 105 (Keeley Hr'g Tr. at 72). It is not clear from the record whether Keeley treated Coleman, the driver of the van, any differently than other drivers who had committed the same type of infraction, as the questions and answers on this subject are opaque. The district court asks Keeley, regarding those to whom he had issued parking tickets, "[a]nd of those people that you drove by, they didn't move and so you waited to see if they would move?" J.A. at 105 (Keeley Hr'g Tr. at 72). Keeley responds in the affirmative and testifies that he stopped them later. Id. It is not clear whether "stopped them later" means within the parking lot or after the vehicle left the parking lot, and before or after running a license-plate search.

Moreover, Keeley concluded that Coleman, the driver of the van, closely resembled the description of the owner of the vehicle that he obtained from the license-plate search because, as Keeley testified, they had "the same build, black males, approximately the same age." J.A. at 79, 83 (Keeley Hr'g Tr. at 46, 50). However, it was dark outside and Coleman was seated, so Keeley could not have easily seen his build or age. J.A. at 79-80, 146 (Keeley Hr'g Tr. at 46-47, 113). Therefore, the only matching characteristics are race and gender, and this suggests that Keeley was stereotyping on the basis of race. Particular attention should be paid to racial profiling claims where, as here under the majority's view, the police's discretion is unconstrained by a heightened suspicion requirement to target a driver for search. See, e.g., Pennsylvania v. Mimms, 434 U.S. 106, 122, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (Stevens, J. dissenting) (warning that "eliminat[ing] any requirement that an officer be able to explain the reasons for his actions ... leaves police discretion utterly without limits," which will result in "[s]ome citizens ... be[ing] subjected to ... [an] indignity while others-perhaps those with more expensive cars, or different bumper stickers, or different-colored skin-may escape it entirely"); United States v. Harvey, 16 F.3d 109, 112-15 (6th Cir.1994) (Keith, J., dissenting) (discussing how excessive police discretion leads to race-based traffic stops); United States v. Harvey, 24 F.3d 795, 796 (6th Cir.1994) (Keith, J., dissenting from denial of rehearing en banc) (same); id. at 798-99 (Jones, J., dissenting from denial of rehearing en banc) (same); David A. Harris, " Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J.Crim. L. & Criminology 544 (1997) (same); cf. Blakely v. Washington, 542 U.S. 296, 315-16, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (linking, in sentencing context, unfettered discretion to race-based decisionmaking) (O'Connor, J., joined by Rehnquist, C.J., Breyer & Kennedy,

JJ., dissenting); Tuilaepa v. California, 512 U.S. 967, 991-92, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (Blackmun, J., dissenting) (explaining that "unguided discretion" of jurors risks that the discretion will be exercised on the basis of race); *574 Batson v. Kentucky, 476 U.S. 79, 105-06, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring) (highlighting, in the context of juror selection, how wide prosecutorial discretion can result in racially motivated decisions that are easy to justify on other grounds); Furman v. Georgia, 408 U.S. 238, 364-65, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring) (explaining that " 'untrammeled discretion' " of jury in determining application of death penalty leads to decisions made on the basis of race (quoting McGautha v. California, 402 U.S. 183, 207, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971))).

The government does not respond to Ellison's racial profiling claim. Officer Keeley testified that he conducted the LEIN check on Ellison's vehicle because "the vehicle was parked illegally." J.A. at 49 (Hr'g Tr. at 16). However, the district court found that Ellison's vehicle was not parked illegally, and the government does not appeal this finding. Because this asserted reason for the LEIN search was discredited and indeed rejected by the district court, the government's race-neutral reason drops away, and Ellison's circumstantial evidence supports the inference that race motivated Officer Keeley's decision to conduct a LEIN search on the vehicle. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) (explaining that "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons," and thus, after a prima facie case of discrimination has been made, "when all legitimate reasons for [a given action] have been eliminated as possible reasons for the [action], it is more likely than not the [decisionmaker], who we generally assume acts only with some reason, based his

decision on an impermissible consideration such as race"). Ellison has presented sufficient evidence in support of his racial profiling claim to warrant a remand to the district court to conduct an evidentiary hearing on this matter.

IV. CONCLUSION

Because courts are governed by the principle of judicial restraint, I would decline to consider the government's Fourth Amendment argument raised for the first time on appeal and would affirm the district court's judgment granting Ellison's motion to suppress on the basis of the district court's credibility determination that no parking violation had occurred. Therefore, I respectfully dissent.

B

No. 04-1 925

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. ORDER

CURTIS E. ELLISON,

Defendant-Appellee.

BEFORE: MOORE, GIBBONS, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No: 04-CR-80084
Honorable Denise Page Hood
United States District Judge

V.

CURTIS ELLISON,

Defendant.

MEMORANDUM OPINION & ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I. Introduction

Defendant has been charged with being a Felon in Possession of a Firearm, pursuant to 18 U.S.C. §922(g)(1). Defendant contests the circumstances around which the weapons were seized. A Smith and Wesson 9mm semi automatic handgun and a Taurus .40 caliber semiautomatic handgun were confiscated from the Defendant's person and/or the vehicle in which he was traveling as a passenger.

This matter is before the Court on Defendant's Motion to Suppress Evidence or in the Alternative for an Evidentiary Hearing. An evidentiary hearing was held on May 18, 2004, and the Court finds as follows:

II. Statement of Facts

Three witnesses testified at the evidentiary hearing. The first witness to testify was Officer Mark Keeley, who was employed by the Farmington Public Safety Department at the time of the incident. He was on patrol in the vicinity of a strip mall on Grand River, cast of Farmington Road. Officer Keeley was working the .5:00 p.m. to midnight shift. At about 7:30 p.m. on New Years Eve (December 31, 2003) he pulled his patrol car into the strip mall. Officer Keeley admitted that it was dark at that time of the evening on that date. He further testified there is no parking directly in front of the businesses as an individual drives into the mall parking lot. Photographs presented as exhibits during the evidentiary hearing support his testimony that the "No Parking" signs are strategically placed directly in front of the businesses.

Officer Keeley testified that when he pulled into the parking lot he could not proceed because a white van was parked blocking one of the thoroughfares lane for traffic. There are two lanes for cars to pass through in this area. Officer Keeley claimed that on hi way into the strip mall parking lot, he passed by the van blocking progress but did not stop the van at that time nor order the driver to move the vehicle, even though the van remained illegally parked as he drove by it. Instead Officer Keeley stated that he drove into the parking lot, and entered the van's license plate number into the LEIN (Law Enforcement Information Network) system. Officer Keeley testified that he permitted the van to remain illegally parked and blocking traffic for two minutes. The LEIN data revealed that the vehicle was registered to Defendant, Curtis Ellison, who had an outstanding warrant for "family offenses." Officer Keeley then claims he decided to radio dispatch, and wait for back up police officers to assist since a felony warrant had been issued for Defendant's arrest.

Officer Keeley claimed the driver, later identified as Edward Coleman, closely resembled the description given by the LEIN information for Defendant Ellison, which was an individual who was a light complected black male along with height and weight. Officer Keeley, of course, was unable to see the height or weight of the Mr. Coleman since he did not exit the vehicle. The passenger, who was the registered owner, Defendant Ellison, returned to the vehicle and Mr. Coleman drove the vehicle away from the strip mall. Despite the fact that the back up assistance Officer Keeley requested had not arrived on the scene and that there were now two black mates in the vehicle, Keeley followed the vehicle out of the mall parking lot and onto Grand River for nearly a mile, activated his overhead lights, and proceeded to stop the vehicle. Even though Officer Keeley continued to testify to the importance of back up assistance, he approached the vehicle before his back up officer arrived. However, Officer Keeley claims he knew the back up officer was behind him somewhere in close proximity.

Officer Keeley's back up officer, Scott Herman, testified that when he arrived at the scene Keeley had already stopped the Defendant's vehicle and was proceeding to the passenger side. He further testified that the vehicle was stopped about a mile past the strip mall where the alleged illegal parking occurred. Officer Keeley stared that he went to the passenger side after ascertaining that the driver was not Defendant Ellison, but that the passenger was Ellison. Officer Herman then assisted in the arrest of Defendant Ellison. The driver, Mr. Coleman, was warned and released.

Edward Colman's version of this incident differs dramatically from that of Officer Keeley. Mr. Coleman claims he dropped Defendant Ellison off in front of the store and drove around to park across, but not directly across, from the store, facing back toward Grand River. From his

testimony, it did not seem he was parked in a parking space, but merely standing in the lot not in front of the store in an illegal parking space. Coleman also claims he stood in front of the store only long enough for Defendant Ellison to get our to go into the store. He claims he never saw a police car pull in the lot and he never blocked any traffic.

Once Officer Keeley had stopped the vehicle, he found char the driver was not Defendant Ellison, but rather the passenger, who admitted he was the car's registered owner. Officer Keeley then proceeded to the passenger side to arrest Ellison on the outstanding warrant. Upon a pat down search by Officer Herman of Defendant Ellison, a weapon was found, and his arrest followed.

According to the Affidavit authorized by Special Agent Sarah A. Pohling of the Bureau of Alcohol, Tobacco and Firearms (ATF):

[T]he Farmington Police Department initiated a traffic stop on a white 1994 Plymouth Voyager, registered to Curtis ELLISON, who returned with a felony warrant for family offenses out of the 36th District Court. Upon a positive identification, ELLISON was searched incident to arrest, at which time Officer Herman of the Farmington Police Department located two semi-automatic handguns (one Smith & Wesson model 910 serial #VCT2520 and one Taurus model PT 140 serial #STD04818) on his person.

(Criminal Complaint/Attached Affidavit, pg. 2, ¶4).

Additional searching of the vehicle revealed approximately $2,000.00 of currency. A "drug dog" was brought to the scene, but no contraband was discovered. It is not necessary for the Court to address further findings of

a fact, as these facts do not support the stop of Defendant Ellison's vehicle which was driven by another individual and in which Defendant Ellison was the passenger.

III. Law & Analysis

The issue before the Court is whether officer Keeley had probable cause to stop Defendant Ellison's vehicle.

A. Probable Cause

Probable cause is defined as "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." *United Stares v. Bennett*, 905 F.2d 931, 934 (6th Cir.1990). As the Sixth Circuit noted in *United Stares v. Barrett*, 890 F.2d 855 (6th Cir. 1989):

The establishment of probable cause 'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 244 n. 13, 103 S.Ct. 2317, 2335 n. 13, 76 L.Ed.2d 527 (1983). A noted in *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 154.3, 75 L.Ed.2d 502 (1983):

[P]robable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. (citations omitted).

Moreover, the existence of probable cause should be determined on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)

This totlaity of the circumstances analysis includes a realistic assessment of the situation from a law enforcement officer's perspective.

Id. at 861.

So long as an officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. See *United States v. Trigg*, 925 F.2d 1064, 1065 (7th Cir. 1990). In this case Officer Keeley testified that the reason he had his sight on Defendant Ellison's vehicle was because it was blocking traffic and parked in a "No Parking" zone. However, Officer Keeley did not approach Defendant Ellison's vehicle at that point to warn the driver, Mr. Coleman, about his alleged illegal parking, nor did Officer Keeley issue a traffic citation for the alleged violation. Instead, Officer Keeley ran a LEIN check on the license plate of the vehicle, pulled over into the parking lot and observed the vehicle while allegedly waiting for the LEIN information to be processed. Once the information was processed and it was discovered that there was a felony warrant out for Defendant Ellison's arrest, Officer Keeley testified that he called for back up assistance and continued to wait while Defendant Ellison's car allegedly continued to cause traffic problems in the mall parking area.

Officer Keeley testified that the reason for delaying in pulling over Defendant Ellison and Mr. Coleman was because he was waiting for back up. However, Officer Keeley's reason for the delay was not supported by his own testimony and conduct when he testified that he proceeded to follow Defendant Ellison's van down Grand River before back up assistance had arrived.

These facts lead the Court to believe that Defendant Ellison's van was not parked in violation of the traffic laws when Officer Keeley decided to take down the license place, run a LEIN check and observe the vehicle. Therefore, the basis upon which the LEIN check was conducted was not valid and the subsequent stop of Defendant Ellison's vehicle was done without probable cause.

B. The Propriety of Officer Keeley's LEIN Check

A review of Michigan cases demonstrates a recognition that the running of LEN checks of vehicle drivers is a routine and accepted practice by the police in this state. See, *People v. Combs*, 160 Mich. App. 666, 668; 408 NW.2d 420 (1987) (LEIN check conducted on driver of vehicle stopped in median of highway). See also, *People v. Hubbard*, 209 Mich. App. 234, 235; 530 NW2d 130 (1995); *People v. Oliver*, 192 Mich. App. 201, 203; 481 NW2d 3 (1991) (vehicle stopped after it was discovered the license plate belonged to another vehicle); *Young v. Barker*, 158 Mich. App. 709, 714; 405 NW.2d 395 (1987) (LEIN check performed when vehicle stopped on highway and the plaintiff did not have a license); *People v. Bell*, 74 Mich. App. 270, 276; 253 N.W.2d 726 (1977) (a LEIN check two days before justified the officer's stop of the driver's vehicle); *People v. Portman*, 73 Mich. App. 366, 369; 251 N.W.2d 589 (1977) (rolling LEIN check performed on vehicle with outdated license plate). However, the Government cannot rely upon this premise for two reasons.

First, the Court does not find Officer Keeley's testimony to be credible. The Court does not believe that Officer Keeley, on New Year's Eve, permitted a vehicle which was illegally parked to block traffic, including the officer's vehicle, for several minutes. It is also incredulous that Officer Keeley observed the van block traffic after the

officer had driven past the vehicle, without so much as a warning to the driver of the vehicle, Mr. Coleman, of the violation. In addition, the Court does not find credence in Officer Keeley's assertion that he regularly observes such traffic violations in the same manner. Officer Keeley's testimony in this regard was not believable. The Court also finds the officer's testimony, that the driver matched the description of Defendant Ellison, lacks credibility. The officer's testimony in this regard only supported char the driver was a black male, just like Defendant Ellison, who is also a black male. The basis for the Court's disbelief of Officer Keeley's testimony relative to the circumstances leading up to Defendant Ellison's arrest was the manner in which the Officer delivered his testimony and his uncertainty regarding the substance of his testimony.

Second, in the instances where LEIN checks have been conducted, the factual circumstances differ from those that are before this Court. In cases where the LEIN checks were accepted as proper, the situation was: (I) the vehicle was stopped first and then the LEIN check was run; (2) the officers had information about the owner of the vehicle due to some ongoing investigation prior to running the LEIN check; or (3) a traffic violation occurred, the LEIN check was run and the vehicle was immediately pulled over. None of these scenarios are present in this case. The Court find Officer Keeley's behavior by his own testimony to be inconsistent with a legitimate LEIN check for purposes of a valid investigation.

Although the Court recognizes chat LEIN checks are legitimate investigatory tools, the Court does not find that its use was proper in this case since the Court does not believe the basis upon which the LEIN check was made, that (Defendant Ellison's van was blocking the thoroughfare of traffic or parked illegally.

C. Other Issues Raised by Defendant Ellison

The Court does not find it necessary to reach a resolution regarding the issue of whether the length of rime during which Defendant Ellison and Mr. Coleman were stopped/delayed was unreasonable and thus violative of the Fourth Amendment. The Court also does not reach a decision relative to the reasonableness of the pat down search conducted by Officer Herman and the search of Defendant Ellison's vehicle conducted by the "drug dogs." Each of these incidents occurred after the illegal stop and anything yielded from the improper activity of Officers Keeley is considered "fruit from the poisonous tree" and is therefore suppressed.

The exclusionary rule bars the admissibility at trial of physical evidence and testimony acquired by law enforcement officers through unconstitutional means. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The rule also applies to exclude evidence subsequently discovered and found to the derivative of those unconstitutional means, or the "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984).

IV. Conclusion

The Court further finds based on the testimony elicited during the evidentiary hearing that the vehicle was not illegally parked and did not block any traffic, including the vehicle of Officer Keeley. Since there was no reason to stop the vehicle, the subsequent arrest is without probable cause and the weapon, the fruit of the illegal stop and arrest, is suppressed.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Suppress Evidence or in the Alternative for an Evidentiary Hearing [Docket No: 9-1, filed April 19, 2004] is GRANTED.

/s/
DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE

DATED: JUNE 16 2004

FILED
AUG 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1710

In the Supreme Court of the United States

CURTIS ELLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding the police stop of petitioner's automobile on a ground not specifically raised in the district court—that an officer's check of petitioner's license plate number in a computer database revealed that petitioner had an outstanding arrest warrant and thereby provided probable cause for the subsequent stop.

2. Whether the court of appeals erred in rejecting petitioner's racial profiling claim on the ground that there was no evidence that petitioner had been subjected to racial profiling.

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In the Supreme Court of the United States

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CURTIS ELLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-63) is reported at 462 F.3d 557. The memorandum opinion and order of the district court (Pet. App. 67-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2006. A petition for rehearing was denied on January 17, 2007 (Pet. App. 65). The petition for a writ of certiorari was filed on April 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Eastern District of Michigan returned an indictment charging petitioner with possessing firearms after having been convicted of a felony,

in violation of 18 U.S.C. 922(g)(1). Pet. App. 34, 67. Before trial, the district court granted petitioner's motion to suppress the relevant firearms. *Id.* at 67-76. On the government's interlocutory appeal, the court of appeals reversed. *Id.* at 32-63.

1. While on routine patrol, Officer Mark Keeley of the Farmington Hills (Michigan) Police Department pulled into a two-lane service drive adjacent to a shopping center. Officer Keeley testified that a white van, with a male driver inside, was idling in the lane closest to the stores in an area marked with "Fire Lane" and "No Parking" signs. Officer Keeley parked to observe the van and entered the vehicle's license plate number into his patrol car's Law Enforcement Information Network (LEIN) computer. The LEIN search revealed that the vehicle was registered to petitioner and that petitioner had an outstanding felony warrant. Officer Keeley radioed for back-up and continued observing the van. After two minutes, another male got into the van, and the van drove away. Officer Keeley followed the van until his back-up was nearby, then activated his lights and stopped the van. Pet. App. 33.

Officer Keeley advised the driver that he was being stopped for parking in a fire lane and asked for his license, registration, and proof of insurance. The passenger then stated that he was the registered owner of the vehicle. After verifying petitioner's identity, the officer arrested him on the outstanding warrant and conducted a safety pat-down, during which he found two handguns on petitioner, a Smith and Wesson 9mm semi-automatic and a Taurus .40 caliber semi-automatic. Pet. App. 33-34, 67.

2. Petitioner was indicted on a charge of being a felon in possession of firearms, in violation of 18 U.S.C.

922(g). Pet. App. 67. Petitioner moved to suppress the seized firearms as the fruit of an illegal search. After an evidentiary hearing, the district court found that the van was not parked illegally and that the officer therefore lacked probable cause to stop petitioner's vehicle. *Id.* at 73. The court further concluded that the officer's LEIN check was not appropriate, in part because no traffic violation had occurred. *Id.* at 74. Accordingly, the court suppressed the firearms. *Id.* at 75.

3. On interlocutory appeal, the government did not challenge the district court's finding that the van was parked legally. Rather, the government argued that because petitioner had no reasonable expectation of privacy in the information contained on his license plate, no probable cause was required for Officer Keeley to run the LEIN check, and the results of the LEIN check provided probable cause for the subsequent stop of petitioner's vehicle. The court of appeals reversed on that basis. Pet App. 32-63.

a. As a preliminary matter, the court of appeals rejected petitioner's contention that it should not consider the expectation-of-privacy issue because the government had not specifically raised it in the district court. Pet. App. 34-36. The court explained that, although it "generally will not consider an argument not raised in the district court and presented for the first time on appeal," that general rule does not apply in "exceptional cases" or where failing to consider the argument would result in a "plain miscarriage of justice." *Id.* at 36 (quoting *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), cert. denied, 488 U.S. 880 (1988)). The court of appeals determined that this case falls within those exceptions because the question is purely legal, the parties fully briefed it, no further fac-

tual development is required, and permitting the district court's erroneous holding to stand would result in a miscarriage of justice. *Ibid.* In doing so, the court of appeals noted that, by holding the LEIN search invalid, the district court had necessarily implied that petitioner had a reasonable expectation of privacy in the information contained on his license plate. *Id.* at 35-36.

Turning to the merits, the court of appeals concluded that an individual does not have a reasonable expectation of privacy in his license plate number. Pet. App. 37-38. The court relied on the settled principles that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," *id.* at 37 (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)), and "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure," *ibid.* (quoting *Harris* v. *United States*, 390 U.S. 234, 236 (1968)).

The court of appeals further observed that, in *New York* v. *Class*, 475 U.S. 106 (1986), this Court held that an automobile's Vehicle Identification Number, located inside the passenger compartment but visible from outside the car, does not receive Fourth Amendment protection because the "exterior of a car, of course, is thrust into the public eye." Pet. App. 37-38 (quoting *Class*, 475 U.S. at 114). "Logically," the court of appeals explained, "this reasoning extends to a legally-required identifier located outside the vehicle," especially considering that "[t]he very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others." *Id.* at 38.

The court of appeals further held that petitioner had no expectation of privacy in an officer's entry of his li-

cense plate number into a law enforcement database because he "had no privacy interest in the information retrieved by" the officer. Pet. App. 38. The court found no support for the contention that "using a license plate number—in which there is no expectation of privacy—to retrieve other non-private information somehow creates a 'search' for purposes of the Fourth Amendment." *Id.* at 38-39. The court further observed that every court that has addressed this issue has agreed that a motorist has no relevant expectation of privacy. *Id.* at 40-41 (citing, *e.g.*, *Olabisiomotosho* v. *City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999); *United States* v. *Matthews*, 615 F.2d 1279, 1285 (10th Cir. 1980)).

In a footnote, the court of appeals observed that petitioner "makes a brief argument on appeal that racial profiling occurred in this case." Pet. App. 42 n.4. The court rejected that contention because "the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black." *Ibid.*

b. Judge Moore dissented. Pet. App. 42-63. She asserted that the court of appeals should not have addressed the expectation-of-privacy issue because the government had not made that argument in the district court and the record did not address various factual questions that she considered relevant to the Fourth Amendment analysis, such as "what type of information is available on the [LEIN] system" and "how this information is obtained." *Id.* at 44-45. Judge Moore also questioned whether it would be constitutional, in the absence of reasonable suspicion, to run a license plate number through the computerized records maintained in the LEIN system, but concluded that the record was inadequate to permit resolution of that issue. *Id.* at 47-55.

Finally, Judge Moore asserted that petitioner had produced sufficient evidence of racial profiling to warrant a remand to the district court for an evidentiary hearing on the issue. Pet. App. 58-63. She relied primarily on the district court's rejection of the officer's proffered reason for the stop. *Id.* at 60-62.

ARGUMENT

Petitioner argues (Pet. 20-30) that the court of appeals erred in reversing the district court's suppression ruling because: (i) the court of appeals considered a ground not raised in the district court; (ii) petitioner had a relevant expectation of privacy; and (iii) petitioner believes he was subject to racial profiling. The court of appeals' interlocutory decision does not warrant further review.

1. As an initial matter, this Court typically awaits final judgment before exercising certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

In particular, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant's conviction and sentence ultimately are affirmed on appeal. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That approach promotes judicial efficiency be-

cause the issues raised in the petition may be rendered moot by further proceedings on remand. If the suppression issue remains live following further proceedings on remand, petitioner could raise that issue, along with any other issues, in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

2. a. Petitioner argues (Pet. 20-23) that the court of appeals should not have considered whether he had a reasonable expectation of privacy because the government did not raise that specific argument in the district court. Petitioner does not argue that the court of appeals adopted an incorrect legal standard concerning the consideration of arguments not raised below, or that the courts of appeals are divided on that question. Instead, like Judge Moore's dissent, petitioner argues that the court of appeals misapplied its legal standard to the facts of this case. See Pet. 21-23; Pet. App. 44-47. That fact-bound contention does not warrant further review. See Sup. Ct. R. 10. To the contrary, this Court has explained that there is no need for uniformity among the circuits in their development or application of rules concerning the consideration of issues not raised in a timely manner. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993); see *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals.").

It is well established that an appellate court may, as a matter of discretion, entertain a legal argument by the appealing party, not advanced below, when the issue is one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the

trial court. See, *e.g.*, *Huber* v. *Taylor*, 469 F.3d 67, 74-75 (3d Cir. 2006); *United States* v. *Echeverria-Escobar*, 270 F.3d 1265, 1268 (9th Cir. 2001), cert. denied, 535 U.S. 1069 (2002). In accord with that principle, the Sixth Circuit has determined that it will consider arguments not raised in the district court in "exceptional cases" or where failing to consider the argument would result in a "plain miscarriage of justice." *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), cert. denied, 488 U.S. 880 (1988) (citation omitted).

The court of appeals properly exercised its discretion to address the government's argument. The court noted that the expectation-of-privacy issue is a purely legal one that the parties had briefed with sufficient clarity and completeness to ensure a proper resolution. Pet. App. 36. Moreover, the district court had held that, under the Fourth Amendment, officers may run license plate numbers through the LEIN system only in limited circumstances, such as when an officer had already stopped a vehicle, had information that preceded the LEIN check, or had observed a traffic violation. *Id.* at 74. As the court of appeals noted, the expectation-of-privacy issue was logically antecedent to that holding because "the district court could only find that the LEIN search violated the Fourth Amendment if it first concluded that [petitioner] had a 'constitutionally protected reasonable expectation of privacy' in his license plate number." *Id.* at 36.

While Judge Moore argued in dissent that factual details abut the LEIN database were necessary to the disposition of the expectation-of-privacy issue, see Pet. App. 45, the court of appeals correctly explained that those questions "are not relevant to the question of whether the entry of petitioner's license plate into the

LEIN system constituted a 'search' under the Fourth Amendment," *id.* at 36-37. Indeed, as discussed below, "[t]he dissent fails to state how using a license plate number—in which there is no expectation of privacy—to retrieve other non-private information somehow creates a 'search' for the purposes of the Fourth Amendment." *Id.* at 38-39. In any event, the court of appeals' discretionary decision to consider the expectation-of-privacy issue does not warrant further review.

b. On the merits, the court of appeals correctly held that petitioner had no reasonable expectation of privacy in his automobile license plate number, which was displayed in plain view outside his automobile. Pet. App. 37-41. Like the dissent, petitioner does not challenge that holding. See Pet. 28; Pet. App. 48. Nor could he: "What a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

Instead, petitioner asserts (Pet. 28-30) that the officer's entry of his license plate number into the LEIN system constituted a "search" without probable cause. But petitioner provides no basis for that contention, and there is none. As the court of appeals explained, retrieving publicly available information such as an arrest warrant is not, without more, a "search" of petitioner's person, house, papers, or effects. See Pet. App. 38-39.

While petitioner relies (Pet. 28-30) on *Delaware* v. *Prouse*, 440 U.S. 648 (1979), that case held that an officer could not make a non-checkpoint *stop* of a vehicle for the purpose of checking a driver's license in the absence of reasonable suspicion or probable cause. *Id.* at 650. The Fourth Amendment was implicated in *Prouse* "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning" of that

Amendment. *Id.* at 653. In contrast to stopping a car and detaining its occupants, however, running a LEIN search does not constitute a seizure. And the results of the LEIN search gave the officer probable cause for the subsequent stop of petitioner's vehicle. See Pet. App. 41.

As the court of appeals noted, its decision is supported by the decisions of all of the other courts to consider the issue. See, *e.g.*, *United States* v. *Diaz-Castaneda*, No. 06-30047, 2007 WL 2044244, at *3 (9th Cir. July 18, 2007) (collecting cases). Petitioner incorrectly suggests that the court of appeals' decision conflicts with decisions that found Fourth Amendment violations where a vehicle stop was based on an officer's mistaken belief that a traffic violation had occurred. Pet. 18 (citing, *e.g.*, *United States* v. *Twilley*, 222 F.3d 1092 (9th Cir. 2002)). There is no conflict, however, because the court of appeals in this case did not uphold the stop based on the officer's belief that a traffic violation had occurred; instead, as discussed, it upheld the search on the alternative ground that the officer knew, from the LEIN search, that there was an outstanding warrant for petitioner's arrest. Pet. App. 41.

3. Finally, petitioner argues (Pet. 10-19, 24-28) that this Court should grant a writ of certiorari to explore broadly the issue of race profiling under the Equal Protection Clause. That issue is not presented in this case. The evidence at the suppression hearing indicated that Officer Keeley entered the license plate number into the LEIN system before he became aware that the driver was black. See Gov't Resp. to Pet. for Reh'g En Banc 7-8. Thus, while the district court rejected the officer's testimony that the van was parked illegally, the court did not find that the LEIN check was racially motivated.

And the court of appeals noted in a footnote that, although petitioner's brief included a short Equal Protection Clause argument, "the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black." Pet. App. 42 n.14; see *ibid.* (emphasizing the "complete lack of evidence to support a racial profiling argument"). The court of appeals' footnote describing its understanding of the record in this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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